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Supreme Court, U.S.
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In The
Supreme Court of the United States

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HEALTHPLAN SERVICES, INCORPORATED,
individually and as successor in interest to
Third Party Claims Management Incorporated, and THIRD
PARTY CLAIMS MANAGEMENT, INCORPORATED,

Petitioners,

v.

MARY B. GUNNELLS, *et al.,*

Respondents.

◆

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

◆

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a class action can be maintained for the determination of a singular common question pursuant to Federal Rule of Civil Procedure 23(c)(4) without finding that such question predominates over individual issues as required by Federal Rule of Civil Procedure 23(b)(3).

2. Whether the Fourth Circuit wholly ignored this Court's binding analysis of the interaction between the predominance requirement in Rule 23(b)(3) and other class action tools found in Rule 23.

3. Whether the Fourth Circuit decided an important and recurring issue regarding the existence of the predominance requirement in the context of Rule 23(c)(4) in a manner that contributes to the conflicting rulings in the Fifth and Ninth Circuits.

PARTIES TO THE PROCEEDING

The petitioners in this case are Healthplan Services, Inc., Individually and as successor in interest to Third Party Claims Management, Inc., and Third Party Claims Management, Inc., which were the defendants in the district court and appellants before the U.S. Court of Appeals for the Fourth Circuit.

The respondents are Mary B. Gunnells, William A. Gunnells, Tele Tech Corporation, Cynthia Mullinax, W & W Truck and Tractor Company, Incorporated, Jerry Freeman, AAA Transmissions, Incorporated, Pamela B. Robertson, Avionics/Seaonics International, Incorporated, James E. Cassleman, Larry Strickland, Brenda Workman, Helen Clark, Bobby F. Buchanan, Joanne Buchanan, Brian Hansen, James E. Wise, John N. Stanley, Daniel L. Driggers, Brenda Vowels, David J. Vowels, Livingston Auto Parts, Incorporated, Philip Livingston, Lukes Cycle Services, Incorporated, Jeff Lucarelli, HH Moorman & Sons, Harold Moorman, Oakland Club, Mark B. Buxton, Stylon of Charleston, Mary Parker, Terry Hensley, Earl Singletary and Ora Singletary, individually and as representatives of all persons and entities similarly situated, which were the plaintiffs in the district court and appellees before the U.S. Court of Appeals for the Fourth Circuit.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that its parent company is HealthPlan Holdings, Inc. and that no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Third Party Claims Management, Inc. and HealthPlan Services, Inc., individually and as successor in interest to Third Party Claims Management, Inc., (collectively referred to as "TPCM") respectfully pray that this Court grant a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in this case on October 30, 2003 and December 18, 2003, affirming Respondents' class action certification under Rule 23 of the Federal Rules of Civil Procedure.

OPINIONS BELOW

The order of the United States District Court, District of South Carolina (App. at 130a-70a) is unreported. The opinion of the Fourth Circuit Court of Appeals (App. at 1a-127a), sought to be reviewed, is reported at Gunnells v. Healthplan Services, Inc., 348 F.3d 417 (4th Cir. 2003). The order of the Fourth Circuit denying the petition for rehearing and for rehearing *en banc* (App. at 171a-76a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 30, 2003. A timely petition for rehearing and for rehearing *en banc* was denied on December 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in its entirety at App. 177a.

STATEMENT OF THE CASE

This case raises an important, recurring issue regarding class action certification in federal courts, and the circuits are in conflict as to its resolution. The conflict centers on whether the determination of a common issue can be certified for class treatment pursuant to Rule 23(c)(4) without finding that the issue predominates over individual issues. Generally, class actions involve a tension between concepts of efficiency and fairness. Here, the Fourth Circuit, in direct conflict with the Fifth Circuit and with this Court's predominance analysis in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), cobbled together a "class" with no regard for the predominance requirement, apparently in hopes of fostering settlement. (See App. at 20a) The Fourth Circuit attempted, but failed, to exalt judicial economy, and did so at the expense of the defendants' right to a fair adjudication.

The "class" certified in this case is, in fact, illusory. The traditional model of class action analysis, as articulated by this Court and as directed by the United States Congress through Rule 23, has been wholly discarded by the Fourth Circuit. Under the authority of Judge Motz's majority opinion, and over Judge Niemeyer's passionate dissent, a federal district court judge can certify any issue under the rubric of

Rule 23(c) for class treatment without conducting a predominance inquiry. Consequently, the Fourth Circuit's majority opinion marks a radical departure from this Court's holding in Amchem and further deepens a circuit split.

This result effects a far reaching expansion of the scope of the class action tool and creates a road map for Rule 23 abuse, circumventing Congressional intent and this Court's well established class action jurisprudence. The only way to prevent this abuse, which will most likely overwhelm the district courts if left unchecked, is by this Court requiring that Rule 23 be construed in accordance with its plain text, and requiring a sequential analysis where predominance is addressed before utilizing Rule 23(c). The clear facts presented by the underlying litigation in this case afford this Court the prime opportunity to address this issue.

A. Class Action Requirements

A proposed class action must meet the requirements of Rules 23(a) and 23(b) to obtain class certification. First, Rule 23(a) sets forth four prerequisites that must be established: (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; and (4) adequacy of representation. Fed. R. Civ. P. 23(a).

If the four requirements in subsection (a) are met, a class must also fall within one of the three categories in Rule 23(b). Actions brought pursuant to Rule 23(b)(3), as in the instant case, must meet two requirements:

predominance and superiority. Predominance requires that "questions of law or fact common to members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prod., 521 U.S. at 623. Superiority requires that a class action be "superior to other methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23 also provides management tools for class actions, and Subdivision (c)(4) authorizes the certification of issues rather than an entire lawsuit for class treatment.

The interplay between Rule 23(b)(3) and Rule 23(c)(4) has created a conflict among the circuits and confusion as to the application of this Court's holding in Amchem. The conflict, as seen by the decision below, centers on whether the determination of a common question can be certified for class treatment pursuant to Rule 23(c)(4) without finding that such question predominates over a morass of individual issues. It is the heightened predominance standard articulated by this Court in Amchem that stands at risk if a writ of certiorari is not granted.

B. Facts Giving Rise to the Present Litigation

The facts in this lawsuit present a scenario that could arise in any complex litigation where class certification is sought pursuant to Rule 23(b)(3), because invariably, if an action as a whole cannot be certified as a class action, litigants will look to 23(c)(4) to certify any common issue.

The underlying action arises from the marketing and sale in South Carolina by a company named Fidelity of health benefits plans known collectively as the "Fidelity Plan," purporting to be an ERISA plan (hereinafter referred to as the "Plan"). In April of 1995 through May 1, 1997, TPCM contracted with Fidelity to adjudicate medical claims for the Plan as a third-party claims administrator. TPCM did not market or sell the Plan or enter into any contracts directly with any of the plaintiffs; it merely provided back office administrative services to Fidelity for a limited period of time.

After TPCM's contract ended, Fidelity began adjudicating claims "in-house." For the next several years, Fidelity and its agents continued to operate the Plan, signing new members, accepting new claims and supposedly adjudicating claims. Under Fidelity's watch, claims began to go unpaid. The frequency of such non-paid claims increased until the Plan was eventually terminated by the United States Department of Labor.

C. Proceedings in the United States District Court

Respondents are South Carolina businesses and employees claiming various damages from either procuring or enrolling in the Plan. Respondents initially brought suit in state court against the corporate entities and individuals who created and administered the Plan, including the individual directors, officers, and other principals of the corporate Fidelity defendants. This matter was removed from state court to the South Carolina District Court, Charleston Division, on September 11, 1998, on the basis of original jurisdiction pursuant to 28 U.S.C. § 1331.[1] Respondents then added as defendants TPCM and South Carolina insurance agents and agencies who sold the Fidelity Plan, alleging unfair trade practices, negligent undertaking, negligence, fraud, negligent misrepresentation, breach of contract, civil conspiracy, and RICO violations.

Respondents moved for class certification pursuant to Rule 23(b)(3) of all entities and people who purchased the Plan or who were provided with coverage under the Plan in South Carolina at any time. The district court certified 24 parallel classes pursuant to Rule 23(c)(4) - one against each of the 23 agents and one against TPCM - but left for individual adjudication over 1400 "mini" trials on the issues of causation and damages, all allegations of violations of the South Carolina Unfair Trade Practices Act and RICO, all conspiracy allegations and all issues that qualify each plaintiff for a claim to the Plan. (App. at 130a) As to TPCM, the district court conditionally certified a class to determine whether "TPCM violated its duties, both contractual and at law, as third party administrator of the Plan and such conduct was a cause of the Fidelity Plan's failure," and that "failure directly injured Plaintiffs and the absent class members." (Id. at 138a) As to the agents, twenty-three subclasses were certified to proceed on four theories of liability: negligent undertaking, fraud, negligent misrepresentation and breach of contract. (Id. at 169a)

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[1] This action has since been stayed as to the Fidelity defendants.

D. The Fourth Circuit's Decision

TPCM and a number of insurance agents timely petitioned the Fourth Circuit Court of Appeals for permission to appeal the district court's ruling pursuant to Rule 23(f) of the Federal Rules of Civil Procedure.[2] The Fourth Circuit granted the petition on the basis that the class certification decision was "manifestly erroneous and certain to be vacated on appeal from final judgment." Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 145 (4th Cir. 2001) (presenting the sole basis argued by TPCM). (See also App. 129a)

The panel majority reversed class certification as to the insurance agents because the classes did not satisfy the predominance and commonality requirements. Yet, and over Judge Niemeyer's vehement dissent, the majority affirmed certification of the single question of whether TPCM was "a" cause of the Plan's failure. (App. at 15a, 74a) Unlike the analysis undertaken with respect to the claims asserted against the agents, which were the same claims advanced against TPCM, the majority did not discuss the predominance of the certified issue as to TPCM in the context of the other issues in the lawsuit, in the context of any cause of action pled by Respondents, or in the context of the lawsuit as a whole. Specifically, the majority held that "[w]hen appropriate a class action may be maintained as to particular issues and, *after* that is done, the provisions of [Rule 23] such as the predominance requirement of (b)(3), shall *then* . . . be construed and applied." (Id. at 51a (first emphasis added)) The majority concluded that Rule 23(c)(4) may be used to sever individual issues for class certification *before* undertaking any predominance inquiry under Rule 23(b)(3). (Id. at 51a-55a) The majority suggests that a contrary reading of Rule 23(c)(4) renders the provision "superfluous" and without "any practical application." (Id. at 52a)

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[2] Venue was proper in the Fourth Circuit in that the judicial proceedings were completed by the United States District Court in Charleston, South Carolina, in the Fourth Circuit.

In his dissent, Judge Niemeyer argued that the predominance requirement of Rule 23(b)(3) applies to issues severed pursuant to Rule 23(c)(4) such that, prior to allowing a class to proceed on a severed issue, a court must first find the severed common issue predominant over the individual issues. He observed that, by holding Rule 23(c)(4) may be invoked to certify a class on a discrete issue before addressing whether that issue predominates in the action, the majority ensures:

> that the predominance of the selected issue is a foregone conclusion, since the common question of law or fact would always predominate over the individual issues that are not a factor. And in the rare case where the majority might find a common issue not to predominate in a given case, it could simply narrow the pinhole until, in its view, the selected issue predominates over the other issues it chooses to see.

(App. at 82a)

He further noted:

> the majority, *without identifying to which of these seven causes of action the certified issue belongs,* has certified for class treatment the vague question whether TPCM was 'a cause' of the failure of the Plan. Naming this certified question a 'cause of action,' but not tying it to any specific claim in the complaint, the majority makes the analysis of what this common question must predominate over particularly abstruse.

(Id. at 84a)

Finally, Judge Niemeyer found the majority's holding to conflict with this Court's ruling in Amchem, with Fifth Circuit decisions and with the Fourth Circuit line of cases on class certification.

TPCM timely filed a petition for rehearing and for rehearing *en banc*. Five Fourth Circuit judges voted to rehear the case *en banc*. (App. at 171a-76a) Seven judges voted against rehearing *en banc*, while one judge disqualified himself from all consideration of this case. (Id. at 176a) As to the panel rehearing, two judges voted to deny; Judge Niemeyer voted to grant panel rehearing. (Id.)

REASONS FOR GRANTING THE WRIT

Supreme Court review is imperative as the decision below creates a conflict in the application of this Court's decision in Amchem and further contributes to circuit conflict as to vitally important and frequently recurring issues of federal procedure: whether a class can be certified for any common issue raised in a lawsuit that is not predominant over the individual issues. The Second Circuit has noted a conflict on this very issue between the Fifth and Ninth Circuits. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 167 n.12 (2d Cir. 2001) (comparing Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996), with Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996)).

The Fourth Circuit has now effectively adopted the Ninth Circuit's interpretation of Rule 23(c)(4) that eliminates the predominance analysis in this context. By failing to find predominance prior to severing the issue, by failing to analyze the common issues in the context of any particular claim or cause of action, and by expressly rejecting that the common issues should predominate in the action as a whole, the Fourth Circuit has aligned itself with the Ninth Circuit, both of which are in direct conflict with the Fifth Circuit on this issue. If permitted to stand, the decision below will allow litigants in the Fourth and Ninth Circuits to obtain class certification of any issue, no matter how small and without regard to whether that issue predominates in the lawsuit, encouraging forum shopping of their cases in these circuits.

I. The Decision of the Fourth Circuit Cannot Be Reconciled with This Court's Recent Class Action Ruling.

The Fourth Circuit's analysis wholly ignored this Court's decision in Amchem, in which this Court analyzed the interaction between the predominance requirement in Rule 23(b)(3) and other class action tools found in Rule 23, particularly that of paragraph (e) applicable to settlements. See Amchem, 521 U.S. at 591-629. In Amchem, this Court was faced with the certification of a class seeking to establish a global settlement of asbestos-related litigation pursuant to the manageability tools found in Rule 23. Id. Of specific concern to this Court was the existence of disparate questions undermining class cohesion, such as class members' exposure "to different asbestos products, for different amounts of time, in different ways, and over different periods." Id. at 642. As such, the Court could not find that the overarching interest in a fair settlement predominated over the multitude of individual issues present in the case. Id. at 624.

This Court then held that ***even in the context of Rule 23(e), the predominance requirement must be met*** and demanded "undiluted, even heightened attention," when invoking the class action management devices set forth in Rule 23. Id. at 620, 623. This Court found that it is not the "mission" of the other provisions of Rule 23 to supply class cohesion and predominance and thereby legitimize an otherwise uncertifiable class. Id. at 623. (See also App. at 81a)

This Court further reiterated the important distinction between the commonality requirement of Rule 23(a) and the predominance of Rule 23(b)(3), a distinction that the Fourth Circuit wholly eviscerated in the present case, by holding that even where commonality is satisfied, "the predominance criterion is ***far more demanding.***" Amchem, 521 U.S. at 624 (emphasis added). Finally, this Court held that if a common interest alone could satisfy the predominance requirement, Rule 23(b)(3) "would be stripped of any meaning." Id. at 623.

This, however, is exactly what the Fourth Circuit has done. The Fourth Circuit applied Rule 23(c)(4) to sever one common issue, then declared that the predominance inquiry should be undertaken ***not*** by comparing the common issues to the individualized issues with the action ***as a whole*** but rather "within that [severed] claim." (App. at 56a) Specifically, the Fourth Circuit affirmed certification of the general question: whether TPCM violated certain duties, causing the Plan's failure and directly injuring the plaintiffs. The Court then characterized this question as one "cause of action," without tying it to any of the seven claims asserted by the plaintiffs against TPCM and declared that such "predominate[s] over the individual issues involved *in that cause of action.*" (App. at 61a n.16) The Fourth Circuit's holding leaves unclear what "cause of action" is relevant to the inquiry because the cause of action advanced by the majority is in fact an amalgam of conflicting, highly distinct, and individualized claims never pled as a single cause of action.[3]

Evidence before the trial court showed that TPCM may not be liable to individual class members for a number of separate, distinct, and legitimate reasons, including, for example, (1) requested additional information to determine the claim was never provided by the insured; (2) the insured had unmet deductibles; (3) there are unresolved co-payment issues; (4) there are applicable penalties; (5) the claim was properly forwarded to Fidelity at the time of TPCM's contract expiration and, because of Fidelity's mismanagement and the Plan's insolvency caused by Fidelity's mismanagement, payment problems arose; (6) the claim was not covered under the Plan; and (7) the claim was never submitted to TPCM for adjudication.

The district court conceded that "an individualized inquiry is necessary for damages such as damage to one's credit rating as well as emotional distress and mental anguish." (App. 152a n.14) Thus, for those issues, it is undisputed that at least 1,400 mini trials must occur even if this matter remains a class action. (Id. at 137a, 144a, 152a-154a) Additionally, in upholding the district court's conclusion that if TPMC contributed to the failure of the Plan only mini-trials on the issue of damages will be required, the Fourth Circuit confused general causation with proximate cause.[4]

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[3] Particularly confusing is the Fourth Circuit majority's inconsistent treatment of the agents and TPCM. Were the Fourth Circuit majority to view each claim pled by the plaintiffs against TPCM - **as undertaken with respect to the insurance agents, for whom class certification was reversed** - it would have discovered that certifying a class against TPCM necessarily fails for the same reasons it fails for the agents. Indeed, Respondents alleged the same causes of action against TPCM that they did against the agents.

The Fourth Circuit held instead that these individualized claims and issues are not factors in analyzing whether the common issues identified by the Fourth Circuit predominate in the certified "claim" against TPCM. As a result, one is left to wonder "exactly *what the isolated common issue must predominate over*." (App. at 82a) The Fourth Circuit majority answers this question by referring back to the "cause of action" it created, without reference to the actual causes of action that were alleged by the respondents, thus leaving the question, in effect, unanswered. (Id. at 61a n.16)

When narrowly viewing the class upheld by the Fourth Circuit, the district court's approach to class certification at the mere presence of potential commonality may be attractive under the guise of efficiency. In fact, however, this certification accomplishes nothing toward efficiency because it is not only lacking in predominance but is also lacking in any level of significance as it leaves a tremendous amount of individual adjudication prior to even determining eventual liability, much less damages. Importantly, this approach destroys the traditional model of analysis of Rule 23 as enacted by Congress and developed by this Court through years of thoughtful jurisprudence.

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[4] Suppose, arguendo, TPCM did contribute to the failure of the Plan, yet, as was demonstrated to be a possibility through the depositions of named plaintiffs/respondents, the unpaid bill of a particular plaintiff is not covered under the Plan, In that case, the plaintiff is entitled to no recovery. However, because of class certification, TPCM might be precluded from introducing evidence that the specific plaintiff's unpaid bill was not covered under the Plan.

Directly analogous to an interest in settlement providing an insufficient common interest as in Amchem, a Rule 23(c)(4) issue must comply with Rule 23(b)(3) in that the issue must predominate over questions affecting only individual members. As Judge Niemeyer recognized:

> [T]he principle of Amchem is that every Rule 23(b)(3) class action must satisfy all of the provisions of Rule 23(a) and (b)(3), and the other provisions of the Rule, including Rule 23(e) [and Rule 23(c)(4)], cannot be used to dilute the requirement that each proposed class must satisfy the predominance requirement to merit certification.

(App. at 81a)

The Fourth Circuit majority failed in its attempt to square its holding with Amchem. Importantly, the Fourth Circuit panel majority relied on Amchem for the direct proposition that was rejected in Amchem, stating that the Amchem Court concluded that "Rule 23(e) affects a court's evaluation of predominance." (Id. at 55a) The Fourth Circuit further claims that its approach is mandated by the plain text of Rule 23 and to hold otherwise would render Rule 23(c)(4) "superfluous." (Id. at 53a) The problem is that the Fourth Circuit's holding renders Rule 23(b)(3) "superfluous," in violation of Amchem. As stated by Judge Niemeyer, the Amchem Court unquestionably found that Rule 23(b)(3) is alive despite the manageability tools found in Rule 23. (Id. at 81a)

The Fourth Circuit has crafted an expansive interpretation of Rule 23(c)(4), enlarging the reach of Rule 23 in a manner not contemplated by the Rule's drafters and not consistent with the Supreme Court's approach calling for an "undiluted" application of Rule 23(b)(3)'s requirements in every case. Amchem, 521 U.S. at 620. Under the Fourth Circuit's approach, courts are authorized to certify for class treatment a single issue, "no matter how small," that does not predominate over individual issues and, in fact, is not even anchored to any cause of action actually asserted by plaintiffs. Under this standard, it is difficult to conceive of any class action complaint which will not be certified as a class on some level, irrespective of the individual issues. The standard applied by the Fourth Circuit and its holding is directly in conflict with Rule 23 and with Amchem.

II. The Fourth Circuit Decided an Important and Recurring Issue of Federal Civil Procedure Governing Class Actions in a Manner that Contributes to the Conflicting Rulings of Other Circuits.

A. Circuit Conflict

The Fourth Circuit's decision vividly illustrates the irreconcilable approaches utilized by the Fourth, Fifth and Ninth Circuits with regard to this issue.[5] The Fourth Circuit's analysis creates a direct conflict with the Fifth Circuit. See Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996). In Castano, the Fifth Circuit held:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.

151 F.3d at 745 n.21. The Fifth Circuit has recently reiterated:

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[5] There is clearly a split among the judges on the Fourth Circuit, as indicated by the narrow majority (7 to 5) who voted to deny an *en banc* hearing in this case.

> Under the plaintiffs' theory, certification of the first stage of the pattern or practice claim would be appropriate presumably because individual-specific issues would be "severed" - but only temporarily - under Rule 23(c)(4), making issues common to the class predominant (at least theoretically) for the purposes of meeting the (b)(3) requirements. But such an attempt to 'manufacture predominance through the nimble use of subdivision (c)(4)' is precisely what Castano forbade. [Allowing] a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement . . . the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

Allison, 151 F.3d at 422; see also Smith v. Texaco, Inc., 263 F.3d 394, 409 (5th Cir. 2001), *withdrawn pursuant to settlement,* 281 F.3d 477 (5th Cir. 2002).

As stated by Judge Niemeyer, the Fifth Circuit has expressly disavowed the manipulation of Rule 23 that would allow severing issues until predominance emerges: the Fifth Circuit employs "exactly the 'rigidly sequential approach' that the majority criticizes in its opinion, making its claim to consistency with the Fifth Circuit facetious, at best." (App. at 87a (citing App. at 51a)) See also Allison, 151 F.3d at 422 (citing Castano, 84 F.3d at 745 n.21).

The Fourth Circuit allows a finding of predominance after such a finding is guaranteed by severing all other issues, a finding of predominance outside any context and without regard to the action for which class certification was actually sought. In contrast, the Fifth Circuit, by its very language, only consults the "housekeeping" provisions of Rule 23(c)(4) "once [the predominance] requirement is met." Smith, 263 F.3d at 409. The Fourth Circuit's present decision presents the optimal vehicle for this Court's resolution of the conflict among the circuits.

B. The Issue Presented by the Conflict is Recurring, and the Decision Below Contributes to the Widespread Uncertainty Regarding the Interplay Between Rule 23 Subsections (b)(3) and (c)(4).

The Fourth Circuit has now aligned itself with the Ninth Circuit, which conflicts with the Fifth Circuit on this very issue. Cf. Valentino, 97 F.3d at 1234, with Castano, 151 F.3d at 745 n.21. The Ninth Circuit expressly adopted a liberal approach to allowing class certifications of an entire lawsuit where the district court conducted the appropriate findings pursuant to Rule 23 subsections (a) and (b). Valentino, 97 F.3d at 1232. Additionally, in contrast with the Fifth Circuit, the Ninth Circuit reasoned that "[e]ven if the common questions do not predominate over individual questions," a district court is authorized "to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues." Id. at 1234. In so holding, the Ninth Circuit abolished a predominance requirement with respect to severing issues pursuant to Rule 23(c)(4). Consequently, the Fourth and Ninth Circuits are in direct conflict with the Fifth Circuit on this issue.

Several district courts have adopted yet another approach. The Western District of Missouri reasoned that the issues covered by a 23(c)(4) certification must be such that their resolution will "materially advance" a disposition of the litigation as a whole: "although common questions need not be dispositive of the entire class action . . . their resolution should at least provide a definite signal of the beginning of the end."[6] In re Tetracyline Cases, 107 F.R.D. 719, 727, 733 (W.D. Mo. 1985). The court, however, expressly rejected the position that issues certified pursuant to (c)(4) need to predominate over the individual issues raised in the lawsuit as a whole, recognizing that the effect of this holding would diminish the predominance requirement in the 23(c)(4) context. Id. at 727. District courts in Kansas and Florida have adopted similar approaches. See Emig v. Am. Tobacco Co., 184 F.R.D. 379, 395 (D. Kan. 1998) (holding the appropriate inquiry under Rule 23(c)(4) is whether resolution of the common issues will materially advance the litigation as a whole); Rink v. Cheminova, Inc., 203 F.R.D. 648 (D. Fla. 2001) (same).

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[6] In the present case, class certification of the issue of whether TPCM was a proximate cause of the failure of the Plan will not materially advance disposition of the entire class action because there will remain inherently individualized inquiries into each plaintiff's damages and into issues of causation.

Finally, the Seventh Circuit has voiced a distinct concern regarding the Seventh Amendment with respect to severing issues for class action treatment from those remaining for individual trials. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995). The Seventh Amendment guarantees the right of an individual to a jury trial in civil actions. The Seventh Circuit has interpreted this right to allow a civil litigant the "right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact" in order to prevent inconsistent jury determinations. Id. at 1303. In the context of Rule 23(c)(4), the Seventh Circuit found that a court should be particularly careful as severing could result in two juries examining overlapping issues, which would effect an unconstitutional result of a second jury reexamining an issue already decided by a first jury. Id. The Fifth Circuit agreed with these Seventh Amendment concerns when (c)(4) is used to sever common issues that are inextricably intertwined with individual issues, as in the instant case. Allison, 151 F.3d at 423-25. This position has been expressly disavowed by the Ninth Circuit. Valentino, 97 F.3d at 1232. Nonetheless, the Seventh Circuit decision, with the Fifth Circuit's agreement, reflects another facet of the widespread confusion facing lower courts seeking to utilize (c)(4) in the context of the other Rule 23 provisions.

C. This Issue is of Great Practical Importance because it Threatens To Dramatically Liberalize Class Certification of Minor Issues in Federal Courts.

The Fifth Circuit correctly recognized that liberalizing the certification of certain issues pursuant to Rule 23(c)(4) without a thorough predominance analysis "distorts the certification process and ultimately results in unfairness to all because of the increased uncertainties in what is at stake in the litigation and in whether the litigation will ever resolve any significant part of the dispute." Allison, 151 F.3d at 422 n.17. The Fifth Circuit also cautioned that such certifications could promote an unfortunate settlement-at-all-costs approach to class certification: "Settlements should reflect the relative merits of the parties' claims, not a surrender to the vagaries of an utterly unpredictable and burdensome litigation procedure." Id. It is clear that the Fourth Circuit majority intended to pressure the parties to settle by upholding class certification as to TPCM. (See App. at 20a)

As a practical matter, this issue can arise in any complex class action lawsuit. Inevitably, if class status cannot be granted to the action as a whole, plaintiffs will seek refuge in Rule 23(c)(4) to certify any issue, "no matter how small," for class treatment. In the Ninth and Fourth Circuits, litigants have dramatically varying procedural rights from those in the Fifth, and perhaps Seventh, Circuits because the lower courts have been given radically different directives. With conflicting direction on this point, lower courts in the other circuits have little guidance for adequately analyzing the issue in a manner that protects the rights of all litigants.

III. The Decision Below is Incorrect.

There is no sound reason to suffer the harms discussed above. The Fourth Circuit's opinion marks a radical departure from well-established and thoughtfully considered jurisprudence of this Court, as correctly followed by the Fifth Circuit, on Rule 23. Importantly, five judges[7] currently sitting on the Fourth Circuit voted to rehear this case, recognizing that this issue is of exceptional importance. See Fed. R. App. P. 35 (stating that an en banc hearing will not be granted except where the proceeding involves a question of exceptional importance).

As a preliminary matter, the court below should have never reached the (c)(4) analysis because the Rule 23(a) requirements were not met. First, cases that turn on individualized proof are patently not suitable for class treatment because the requirements of commonality and typicality cannot be met.

In the present case, individual proof with respect to aspects of liability ***and*** damages will be necessary for each class member, even as currently certified. Over 1400 individualized adjudications will be required with respect to liability, comparative fault,[8] and damages. Compared to the number and nature of the individualized issues, the alleged common issue that has been certified is insignificant and "will yield remarkably little in advancing the class members' individual claims toward a resolution." (App. at 108a) In fact, the common question identified by the Fourth Circuit majority - whether TPCM contributed to the collapse of the Plan - "is an underwhelming commonality in light of the substantial individualized inquiries necessary to determine ***liability***, not to mention damages." (Id. at 109a (emphasis added))

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[7] One of the judges recused himself from the vote.

Second, class representatives must "fairly and adequately protect the interests of the class . . .," Fed. R. Civ. P. 23(a)(4), and "must be part of the class and possess the same interest and suffer the same injury as the class members." Amchem, 521 U.S. at 625-26. The record shows that the respondents lack knowledge to support the allegations of the class they purport to represent. Contrary to allegations in the complaint, not one of the respondents testified about being injured by TPCM.

Finally, under Rule 23(b)(3), the class action avenue must be the superior method for the fair and efficient adjudication of the dispute. See Fed. R. Civ. P. 23(b)(3). The superiority analysis includes a consideration of whether the class members have an interest "in individually controlling the prosecution or defense of separate actions" and of manageability of the class action. Fed. R. Civ. P. 23(b)(3)(A), (D). At least 17 actions have been filed in South Carolina involving the sale and eventual failure of the Plan, and TPCM has not been named as a defendant in a single one of those actions. These lawsuits clearly demonstrate that individuals are motivated to bring individual actions.

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[8] The majority overlooked comparative fault principles as to TPCM, yet agreed such principles "pose significant obstacles to class certification" with respect to the insurance agent Appellants. (App. at 48a)

Manageability encompasses the whole range of practical problems that renders the class action format inappropriate for this suit. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974). In Windham v. American Brands, 565 F.2d 59 (4th Cir. 1977) (en banc), the Fourth Circuit, hearing the appeal of the district court's denial of class certification on predominance and manageability grounds, stated:

> Where the issue of damages and impact does not lend itself to . . . a mechanical calculation, but requires separate mini-trial(s) of an overwhelming large number of individual claims, courts have found that the staggering problems of logistics thus created make the damage aspect of (the) case predominate, and render the case unmanageable as a class action.

Windham, 565 F.2d at 67-68 (internal quotations omitted). This is *exactly* the problem in the present case. The District Court acknowledged that bifurcation and mini-trials are the only solutions to this case proceeding as a class action. The Fourth Circuit majority essentially avoided the unmanageability issue, and, as Judge Niemeyer recognized, erroneously found comfort from the conditional aspect of the certification:

> This view defaults our responsibility and employs a backward burden in demonstrating the superiority of the class action device. The majority apparently believes that no matter how complex, a complaint comes to the court bearing an entitlement to certification unless the court can prove why it should not be certified.

(App. at 120a n.8)

Judge Niemeyer artfully articulated that the class certified in the instant case "is a hodgepodge of dissimilarly situated plaintiffs who dealt with the defendants at different times and under different circumstances and who have antagonistic interests. The class here is cobbled together to resolve very little before ultimately relegating the hard questions to individual trials." [9] (App. at 106a-7a) As a result, and as demanded by Amchem, such a case never should have been certified as a class action.

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[9] If it appears reasonably likely, as is the case here, that the trial on a class action will become unmanageable, a court does no favor to the plaintiffs or the defendants by deferring decertification until a point in time when unmanageability actually occurs.

CONCLUSION

The purpose of class actions is to promote efficiency in the litigation of issues, without compromising the fairness owed to each defendant, namely the defendant's right to contest each plaintiff's individual claims of liability and damages. When faced with the recurring issue of the interplay between the provisions of Rule 23, the Fourth and Ninth Circuits have impinged on fairness in their quest to promote the efficient disposition of cases. In doing so, the Fourth Circuit's decision directly contravenes this Court's holding in Amchem and Fifth Circuit jurisprudence on this issue. This case presents this Court with the optimal vehicle for addressing this issue, and thus warrants the granting of a writ of certiorari.

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2419

MARY B. GUNNELLS; WILLIAM A. GUNNELLS; TELE - TECH CORPORATION; CYNTHIA MULLINAX; W & W TRUCK AND TRACTOR COMPANY, INCORPORATED; JERRY FREEMAN; AAA TRANSMISSIONS, INCORPORATED; PAMELA B. ROBERTSON; AVIONICS/SEAONICS INTERNATIONAL, INCORPORATED; JAMES E. CASSLEMAN; LARRY STRICKLAND; BRENDA WORKMAN; HELEN CLARK; BOBBY F. BUCHANAN; JOANNE BUCHANAN; BRIAN HANSEN; JAMES E. WISE; JOHN N. STANLEY; DANIEL L. DRIGGERS; BRENDA VOWELS; DAVID J. VOWELS; LIVINGSTON AUTO PARTS, INCORPORATED; PHILIP LIVINGSTON; LUKES CYCLE SERVICES, INCORPORATED; JEFF LUCARELLI; HH MOORMAN & SONS; HAROLD MOORMAN; OAKLAND CLUB; MARK B. BUXTON; STYLON OF CHARLESTON; MARY PARKER; TERRY HENSLEY; EARL SINGLETARY; ORA SINGLETARY, individually and as representatives of all persons and entities similarly situated,

Plaintiffs-Appellees,

v.

HEALTHPLAN SERVICES, INCORPORATED, individually and as successor in interest to Third Party Claims Management, Incorporated; THIRD PARTY CLAIMS MANAGEMENT, INCORPORATED,

Defendants-Appellants,

and

FIDELITY GROUP INC.; INTERNATIONAL WORKERS GUILD, INCORPORATED; NATIONAL ASSOCIATION OF BUSINESS OWNERS AND PROFESSIONALS; IWG HEALTH AND WELFARE FUND; FIDELITY CLAIMS MANAGEMENT, INCORPORATED; EXECUTIVE CONSULTANTS INSURANCE AGENCY; RAYMOND R. OLIVI; JOHN BRANHAM; STEVEN BROUGHTON; JOHN COLLINS; REX CULBERTSON; ROBERT DAVIES; RICHARD DEXTAZE; KENNETH EVERY ANDREWS; FRANKIE FORT; ROBERT GERMAN; GARY GEITLER; MELISSA GEITLER; MARTIN T. GEITLER; MICHAEL D. GEITLER; GEORGE GRADEK; HUBERT G. GREENE; PHILLIP S. HODGSEN; EARL ISABELL; STEPHEN LACY; FREDERICK MALONE; DAVID E. MARTIN; MICHAEL MASSEY; HENRY MERCHANT; TINA MESSINGER; MICHAEL R. REQUA; BRUCE ROWAN; PAMELA REGOPOULUS; BRUCE RYALS; BARBARA A. SCOTT; HENRY K. SKINNER, JR.; ELMER STONE; KENNETH R. TALLMADGE; LEE

TAYLOR; MICHAEL THOMAS; SCOTT TODD; ARNOLD H. VALENTINE; RICHARD M. VANN; LEWIS H. WADE; DAVID M. WHITE; HERBERT L. WILLIAMS; BEN L. WELLS; JACK E. WILSON, individually and in his representative capacity; ANCHOR INSURANCE AGENCY; BRANHAM AND GEITLER ASSOCIATES; DIVERSIFIED INSURANCE; LEGEND EQUITIES CORPORATION; FINANCIAL BENEFITS, INCORPORATED; THE TAYLOR AGENCY INCORPORATED; TRUETT AND ASSOCIATES; COLONIAL LIFE & ACCIDENT INSURANCE COMPANY, a UNUM Company; DWAYNE A. SAMUELS; EUGENE O. DUNCAN; DAVID SPOONER; CHARLES L. BRADLEY; TERRENCE E. RHUE; NOEL SHAW; PAUL D. ASKEW; PHILLIP STASHIN; KEN AVERIES,

Defendants.

No. 01-2420

MARY B. GUNNELLS; WILLIAM A. GUNNELLS; CYNTHIA MULLINAX; JERRY FREEMAN; PAMELA B. ROBERTSON; JAMES E. CASSLEMAN; LARRY STRICKLAND; BRENDA WORKMAN; HELEN CLARK; BOBBY F. BUCHANAN; JOANNE BUCHANAN; BRIAN HANSEN; JAMES E. WISE; JOHN H. STANLEY; DANIEL L. DRIGGERS; BRENDA VOWELS; DAVID J. VOWELS; PHILIP LIVINGSTON; JEFF LUCARELLI; HAROLD MOORMAN; MARK B. BUXTON; MARY PARKER; TERRY HENSLEY; EARL SINGLETARY; ORA

SINGLETARY, individually and as representatives of all persons and entities similarly situated; W & W TRUCK AND TRACTOR COMPANY, INCORPORATED; LUKES CYCLE SERVICES, INCORPORATED; AAA TRANSMISSIONS, INCORPORATED; LIVINGSTON AUTO PARTS, INCORPORATED; HH MOORMAN & SONS; TELE TECH COMPANY, INCORPORATED; AVIONICS SEAONICS INTERNATIONAL, INCORPORATED; OAKLAND CLUB; STYLON OF CHARLESTON, entities similarly situated,

Plaintiffs-Appellees,

v.

MICHAEL R. REQUA; ARNOLD H. VALENTINE; FINANCIAL BENEFITS, INCORPORATED; LEWIS H. WADE; BRUCE RYALS; GEORGE GRADEK; TINA MESSINGER; KENNETH EVERY ANDREWS; RAYMOND R. OLIVI; EXECUTIVE CONSULTANTS INSURANCE AGENCY; MICHAEL MASSEY; ANCHOR INSURANCE AGENCY; JOHN COLLINS, individually and in their representative capacities,

Defendants-Appellants,

and

FRANKIE FORT; FIDELITY GROUP INC.; INTERNATIONAL WORKERS GUILD, INCORPORATED; NATIONAL ASSOCIATION OF BUSINESS OWNERS AND PROFESSIONALS; IWG

HEALTH AND WELFARE FUND; FIDELITY CLAIMS MANAGEMENT, INCORPORATED; JOHN BRANHAM; STEVEN BROUGHTON; REX CULBERTSON; ROBERT DAVIES; RICHARD DEXTAZE; ROBERT GERMAN; GARY GEITLER; MARTIN T. GEITLER; GARY GEITLER; MICHAEL D. GEITLER; HUBERT G. GREENE; PHILLIP S. HODGSEN; EARL ISABELL; STEPHEN LACY; FREDERICK MALONE; DAVID E. MARTIN; HENRY MERCHANT; BRUCE ROWAN; PAMELA REGOPOULUS; BARBARA A. SCOTT; HENRY K. SKINNER, JR.; ELMER STONE; KENNETH R. TALLMADGE; LEE TAYLOR; MICHAEL THOMAS; SCOTT TODD; RICHARD M. VANN; DAVID M. WHITE; HERBERT L. WILLIAMS; BEN L. WELLS; JACK E. WILSON; BRANHAM AND GEITLER ASSOCIATES; DIVERSIFIED INSURANCE; LEGEND EQUITIES CORPORATION; THE TAYLOR AGENCY, INCORPORATED; TRUETT AND ASSOCIATES; COLONIAL LIFE & ACCIDENT INSURANCE COMPANY, a UNUM Company; HEALTHPLAN SERVICES, INCORPORATED, individually and as successor in interest to Third Party Claims Management, Incorporated; THIRD PARTY CLAIMS MANAGEMENT, INCORPORATED; DWAYNE A. SAMUELS; EUGENE O. DUNCAN; DAVID SPOONER; CHARLES L. BRADLEY; TERRENCE E. RHUE; NOEL SHAW; PAUL D. ASKEW; PHILLIP STASHIN; KEN AVERIES, individually and in their representative capacities,

Defendants.

Appeals from the United States District Court
for the District of South Carolina, at Charleston.
Patrick Michael Duffy, District Judge
(CA-98-2659)

Argued: September 23, 2002
Decided: October 30, 2003
[ENTERED: October 30, 2003]

Before NIEMEYER, MOTZ, and KING, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Motz wrote the opinion, in which Judge King concurred. Judge Niemeyer wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: William R. Lewis, NELSON, MULLINS, RILEY & SCARBOROUGH, L.L.P., Charleston, South Carolina; James Y. Becker, HAYNSWORTH SINKLER BOYD, P.A., Columbia, South Carolina, for Appellants. Christian Hancock Hartley, RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, L.L.C., Charleston, South Carolina; Justin S. Kahn, KAHN LAW FIRM, Charleston, South Carolina, for Appellees.

ON BRIEF: Charles R. Norris, NELSON, MULLINS, RILEY & SCARBOROUGH, L.L.P., Charleston, South Carolina; John H. Tiller, Elizabeth J.V. Speidel, HAYNSWORTH SINKLER BOYD, P.A., Columbia, South Carolina; H. Michael Bowers, YOUNG, CLEMENT, RIVERS & TISDALE, Charleston, South Carolina; Thomas J. Keaveny, II, SIMONS & KEAVENY, Charleston, South Carolina, for Appellants.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

This appeal presents the question of whether the district court abused its discretion in conditionally certifying a class action in a suit brought by purchasers and beneficiaries of a multi-employer health care plan for claims growing out of the plan's collapse. The district court conditionally granted class certification against the plan's claims administrator, Healthplan Services Inc., as successor in interest to Third Party Claims Management, Inc. (collectively, "TPCM") and against individual and corporate insurance agents who marketed and sold the plan. The court properly applied controlling legal principles and made well-supported factual findings supporting its decision to certify a class action against TPCM; thus, we see no abuse of discretion in that decision. However, because the court rested its class certification against the individual agents on findings grounded in a misapprehension of governing law, we must conclude that the court did abuse its discretion in certifying those separate class actions. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

Since this is an interlocutory appeal, filed even before the parties have completed discovery, the facts surrounding the claims of the purchasers and beneficiaries (collectively, "Plaintiffs") have not been fully developed. Thus, the record to date reveals only the following rough outline of the events leading up to the present lawsuit.

Sometime in 1995, Fidelity Group, Inc., the National Association of Business Owners and Professionals ("NABOP"), and the International Workers Guild, Inc. ("IWG"), created the IWG Health and Welfare Fund (the "Fund"), which in turn offered a health care and dental plan (the "Plan") to interested purchasers. From August 1996 until June 1997, when the South Carolina Department of Insurance ordered marketing to cease, the agents marketed and sold the Plan. Although it was purportedly marketed as an ERISA plan, the Plan never complied with ERISA requirements.

In April 1995, Fidelity hired TPCM to process claims under the Plan as a third party administrator. TPCM failed to keep pace with the claims received, creating a huge backlog of unprocessed claims. In May 1997, Fidelity fired TPCM for incompetence and attempted to transfer the claims management process to an in-house operation. Assertedly, difficulties in obtaining data from TPCM and the massive backlog it had created ultimately led to the Plan's collapse.

Approximately 1400 employees and their families contracted for coverage under the Plan. As many as 2900 claims have gone unpaid, amounting to millions of dollars in unpaid medical bills.

In August 1998, Plaintiffs sued Fidelity Group, NABOP, IWG, and the Fund (collectively, "the Fidelity Defendants") in state court in South Carolina. The defendants removed the case to federal court. Later in the year, Plaintiffs amended their complaint to add TPCM and the agents as defendants. In that complaint, Plaintiffs allege that one or more of the defendants engaged in negligent undertaking, fraud, negligent misrepresentation, breach of contract, civil conspiracy, and violated the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140 (1985), and Title IX of the Organized Crime Control Act of 1970, 18 U.S.C.A. §§ 1961-68 (West 2000 & Supp. 2000) ("RICO").[1] In short, Plaintiffs assert that the agents breached contractual and fiduciary duties owed to the Plaintiffs and misrepresented the Plan's attributes through their marketing efforts, which caused Plaintiffs to purchase the woefully deficient Plan. As to TPCM, Plaintiffs allege that it mismanaged administration of the Plan, created a huge backlog of unpaid claims, did not timely transfer information, and made it impossible to forecast rate increases accurately, resulting in the Plan's collapse and failure to pay hundreds, if not thousands, of health care claims. In their prayer for relief, Plaintiffs

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[1] Also in 1998, the United States Department of Labor filed suit against the Fidelity Group for actions relating to the Fund in the Eastern District of New York. That court issued an order on January 8, 1999 staying all pending actions against the Fund. Pursuant to this order, the district court in South Carolina issued a stay of the proceedings in the present case. After the New York court clarified that its stay reached only the Fidelity Defendants, the district court in the case at hand lifted the stay with respect to the "non-Fidelity Defendants" – TPCM and the agents. Ultimately, on the advice of a court-appointed fiduciary, the New York court ordered the Plan terminated effective January 31, 1999.

> seek recovery for all legally allowable damages including refunds of premiums paid, payment of outstanding medical/dental bills, reimbursement for medical bills paid by Plaintiffs where treatment occurred while Plaintiffs were covered by the Plan, compensation for injury to credit, compensation for injury to ability to obtain credit, time spent and costs incurred attending to the difficulties resulting from the failure of the Plan, loss of enjoyment of life attendant to the stress caused by the failure of the Plan.

Plaintiffs also seek punitive damages.

After some initial discovery, Plaintiffs moved for certification of a class, pursuant to Federal Rule of Civil Procedure 23(b)(3), of "all entities and people who purchased the Fidelity Plan or who were provided with coverage under the Fidelity Plan in South Carolina at any time." In addition, with respect to certain "agent-specific" claims, Plaintiffs moved for certification of subclasses consisting of "all entities and persons who purchased the Fidelity Plan from or were provided the Fidelity Plan by that particular agent in South Carolina."

After refusing to certify any claims under the South Carolina Unfair Trade Practices Act, *see* S.C. Code Ann. § 39-5-140(a) (West 1985) (a person "may bring an action individually, but not in a representative capacity, to recover actual damages"), the district court granted Plaintiffs' class certification motion in large part. *Gunnells v. Fidelity Group, Inc.*, No. 2:98-2639-23 (D.S.C. Sept. 28, 2001) (located at J.A. 1244-1271). The court conditionally granted Plaintiffs' motion for class certification with respect to their mismanagement claim against TPCM. Moreover, although the court declined to certify Plaintiffs' civil conspiracy and RICO claims against the agents, it did certify subclasses to permit Plaintiffs to pursue their four theories of liability -- negligent undertaking, fraud, negligent misrepresentation, and breach of contract -- via separate class actions against each of the twenty-three agents that assertedly sold insurance to a named class representative, withholding "ruling on the certification of the agent classes for which there was currently no representative." J.A. 1265 n.21.

Pursuant to Federal Rule of Civil Procedure 23(f), both TPCM and a number of agents[2] (collectively, "the Agents") petitioned for permission to file an interlocutory appeal, which we granted.

II.

Class actions must meet several criteria. First, the class must comply with the four prerequisites established in Rule 23(a): (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; and (4) adequacy of representation. Fed. R. Civ. P. 23(a). Second, the class action must fall within one of the three categories enumerated in Rule 23(b); here

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[2] Originally, fourteen agents appealed the class certification order. While the appeal was pending, eight agents moved to withdraw their appeal because they had reached a settlement with the class. We now grant the eight agents' motion to withdraw their appeal and remand to the district court for consideration of the settlement proposal pursuant to Federal Rule of Civil Procedure 23(e) and in light of this opinion. *See* Fed. R. Civ. P. 23(e); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) (articulating different standard for settlement-only class certification). Our holding with respect to the district court's certification of subclasses against individual agents, therefore, pertains only to the six agents whose appeals remain before us.

Plaintiffs seek to proceed under Rule 23(b)(3), which requires that common issues predominate over individual ones and that a class action be superior to other available methods of adjudication. Fed. R. Civ. P. 23(b)(3).

If a lawsuit meets these requirements, certification as a class action serves important public purposes. In addition to promoting judicial economy and efficiency, class actions also "afford aggrieved persons a remedy if it is not economically feasible to obtain relief through the traditional framework of multiple individual damage actions." 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.02 (3d ed. 1999). Thus, federal courts should "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case 'best serve the ends of justice for the affected parties and . . . promote judicial efficiency.'" *In re A.H. Robins*, 880 F.2d 709, 740 (4th Cir. 1989).

To be sure, Rule 23(b)(3) class actions must meet predominance and superiority requirements not imposed on other kinds of class actions. This is because these suits involve situations where "class-action treatment is not as clearly called for." Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment, subdivision (b)(3)). However, as the Supreme Court has noted, the predominance and superiority requirements in Rule 23(b)(3) do not foreclose the possibility of mass tort class actions, but merely ensure that class certification in such cases "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615 (quoting Adv. Comm. Notes, 28 U.S.C. App. at 697). For these very reasons, we have expressly "embraced the view that the mass tort action for damages may be appropriate for class action, either partially or in whole." *Central Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1992) (citation, internal quotation marks, ellipses, and alterations omitted).

Furthermore, "district courts have wide discretion in deciding whether or not to certify a class and their decisions may be reversed only for abuse of discretion," *id.* (internal quotation marks omitted), recognizing, of course, that this "discretion must be exercised within the framework of Rule 23." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996)). Our review is particularly deferential in a case like this -- involving an interlocutory appeal of a conditional class certification. *See Central Wesleyan*, 6 F.3d at 186 (noting that "the tentative, limited nature of the conditional certification . . . counsels in favor of affirmance.").[3]

With these principles in mind, we turn to the case at hand. Plaintiffs' claims against TPCM and the Agents rest on different bases. Accordingly, like the district court, we consider class certification with respect to TPCM and the Agents separately.

III.

The district court conditionally certified the plaintiff class against TPCM allowing the class to pursue a single claim: "that TPCM violated its duties, both contractual and at law, as third party administrator of the Plan and such conduct was a cause of the Fidelity Plan's failure," and that "failure directly injured Plaintiffs and the absent class members." J.A. 1249.

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[3] Thus, in paying heed to "the 'conditional' aspect of [the] certification" here, we do not, as the dissent asserts, "default [ ] our responsibility" or "employ[ ] a backward burden." *See post* at 83 n.8. Rather, we simply follow *Central Wesleyan*'s well-established directive. The dissent not only ignores that directive, it also contends (without explanation) that other "portions" of *Central Wesleyan* may have been "superseded" by *Amchem*. *See post* at 86. We disagree. In fact, in *Central Wesleyan*, the court carefully recognized and sought to avoid the problems created by the lower court in *Amchem*. *See Central Wesleyan*, 6 F.3d at 182, 189 (noting that "the Third Circuit's ongoing experiment in class certification [in the *Amchem* litigation] has not been an unqualified success").

A.

We note at the outset both that the certification order concerning TPCM is strikingly similar to the certification order we upheld in *Central Wesleyan and* that the district court carefully followed the framework approved in *Central Wesleyan,* 6 F.3d at 183-186. Here, as in *Central Wesleyan,* "the district court conducted a straightforward analysis of the class certification requirements under Fed. R. Civ. P. 23(a) and 23(b)(3)," determined that each requirement had been met, and "supported each of its 23(a) and 23(b)(3) holdings with detailed findings." *Id.* at 183, 186.

First, the district court found that the "1400 employees plus their families" covered by the Plan, with possibly 2900 unpaid claims, "easily" satisfied Rule 23(a)(1)'s numerosity requirement. J.A. 1248. *Cf. Central Wesleyan,* 6 F.3d at 183 (noting district court's finding "that some 480 potential class members would easily satisfy the numerosity requirement"). The court found Rule 23(a)(2) commonality and Rule 23(a)(3) typicality because of the many "factual and legal issues pertaining to TPCM's conduct . . . common" to "all Plaintiffs and class members," such as: "(1) facts surrounding how TPCM managed its operations; (2) whether it created a backlog of claims; ([3]) whether it failed to enter claims into its system; ([4]) whether it breached its contractual duties; [and (5)] whether TPCM's alleged negligence proximately caused Plaintiffs' injuries by contributing to the failure of the

Plan." J.A. 1254-55. The district court recognized that some of the Plaintiffs' damages claims might require "individual inquiry" but found that, if necessary, those issues could be bifurcated for individual trials as they were in *Central Wesleyan*, 6 F.3d at 188-90. *See* J.A. 1254. With regard to Rule 23(a)(4) adequacy, the court recognized that "class representatives" must "be part of the same class and possess the same interest and suffer the same injury as the class members" and found that in this case the named plaintiffs satisfied these requirements, noting particularly that no "potential conflict existed" among class members. *Id.* at 1257; *cf. Broussard v. Meineke,* 155 F.3d 331, 337-38 (4th Cir. 1998) (holding "manifest conflicts of interest" among members of class precludes class certification).

As in *Central Wesleyan,* 6 F.3d at 183-84, the district court next turned to the Rule 23(b)(3) requirement that "questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action [be] superior to other available methods to the fair and efficient adjudication of the controversy," and "specifically addressed the four matters the Rule lists as pertinent to these findings." First, the court found that the class members had evidenced "no great deal of interest . . . in individual litigation," noting as support for this finding that although "1400 potential litigants exist," there was a "dearth of individual cases filed until now." J.A. 1260. Second, the court held that in view of the few pre-existing cases, a class action would be productive. *Id.* at 1261. Third, the court concluded that "the flexibility and control of this action in one forum [the federal district court in South Carolina] provides the benefits which outweigh the method of individual litigation." *Id.* at 1260.

Finally, and again as in *Central Wesleyan*, 6 F.3d at 184, the district court acknowledged "particular concern" with the fourth factor: "the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3)(D). The court found that bifurcation of a few issues (*e.g.*, some damages issues) requiring individualized determination would assist it in managing the class action, but recognized that, even so, "given the number of possible class members in this action . . . manageability could quickly dissipate." J. A. 1260. Accordingly, the district court resolved only to grant conditional certification of the class and explained that it would not hesitate to decertify the class if it should prove unmanageable. *Id.* at 1260-61. (We note that in *Central Wesleyan*, 6 F.3d at 188-89, we upheld a district court's conditional certification order in the face of far more formidable management concerns, *i.e.*, not only the possible need for individualized damage determinations, but also a "daunting number of individual issues" necessary to "establish liability," including determination of "comparative fault" among numerous defendants, "different time bar defenses" with respect to differently positioned defendants, and the necessity of application of the laws of different jurisdictions.)

Thus, here, as in *Central Wesleyan*, the district court carefully considered the requirements of Rule 23(a) and (b)(3) and made specific and detailed findings as to compliance with those requirements. In doing so, the court followed the admonition in *A.H. Robins*, 880 F.2d at 740, to "take full advantage of the provision in [Rule 23(c)(4)] permitting class treatment of separate issues . . . to reduce the range of disputed issues" in complex litigation, and most especially the teachings of *Central Wesleyan* itself, and then exercised its discretion to grant conditional class certification.

As in *Central Wesleyan*, we must acknowledge that "such an approach has its promise." 6 F.3d at 185. First, it appears likely that in the absence of class certification, very few claims would be brought against TPCM, making "the adjudication of [the] matter through a class action . . . superior to no adjudication of the matter at all." *See* 5 *Moore's Federal Practice* § 23.48[1] (1997). Thus, class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action. As the Supreme Court put the matter, "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (citation omitted).

Moreover, as in *Central Wesleyan,* class certification in this case seems likely to reduce litigation costs through the "consolidation of recurring common issues." 6 F.3d at 185. Such recurring common issues make up the heart of Plaintiffs' case against TPCM, *i.e.,* whether TPCM mismanaged the Fund, whether TPCM's mismanagement was a proximate cause of the Plan's collapse, whether the Fidelity Defendants also mismanaged the Fund, and whether the Fidelity Defendants' mismanagement was an intervening cause of the Plan's collapse sufficient to relieve TPCM of liability. Proving these issues in individual trials would require enormous redundancy of effort, including duplicative discovery, testimony by the same witnesses in potentially hundreds of actions, and re-litigation of many similar, and even identical, legal issues.

Consolidation of these recurring common issues will also conserve important judicial resources. The record in this case already reveals that a trial on these common issues alone is likely to be lengthy, requiring extensive exploration of the Plan's collapse and TPCM's role. The prospect of a long trial, with the possibility of a large damage award may also encourage settlement, which "should be a factor, and an important factor, to be considered when determining certification." *Id.* at 186 (quoting *A.H. Robins,* 880 F.2d at 740).

Furthermore, class certification "provides a single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects *the defendant* from inconsistent adjudications." 5 *Moore's Federal Practice* § 23.02 (1999) (emphasis added). This protection from inconsistent adjudications derives from the fact that the class action is binding on all class members. *See* Fed. R. Civ. P. 23(c)(2)(B). By contrast, proceeding with individual claims makes the defendant vulnerable to the asymmetry of collateral estoppel: If TPCM lost on a claim to an individual plaintiff, subsequent plaintiffs could use offensive collateral estoppel to prevent TPCM from litigating the issue. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979) (concluding that the use of offensive collateral estoppel should not be precluded in federal courts). A victory by TPCM in an action by an individual plaintiff, however, would have no binding effect on future plaintiffs because the plaintiffs would not have been party to the original suit. *See Allen v. McCurry*, 449 U.S. 90, 95, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980) ("The concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue.") (citing *Montana v. United States*, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979)). Class certification thus promotes consistency of results, giving defendants the benefit of finality and repose.[4]

Indeed, it appears at this juncture that the single claim certified against TPCM -- mismanagement of the Plan resulting in its ultimate collapse similarly affecting a large group of people in a single state -- seems even better suited for class treatment than the diverse issues against many defendants involving the laws of a number of states that we certified in *Central Wesleyan*.

B.

Notwithstanding these substantial advantages to class certification, TPCM, like the defendants in *Central Wesleyan*, "argues that the district court committed multiple errors in conditionally certifying the class." 6 F.3d at 184. We disagree.

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[4] Thus, TPCM benefits more from class certification than the Plaintiffs in some ways, since the effect of class certification on collateral estoppel redounds to the benefit of defendants, not plaintiffs, whereas the beneficial economies of class certification redound to all parties, as well as to the courts. One suspects, therefore, that TPCM resists certification in an attempt to keep Plaintiffs with relatively small claims out of court altogether -- precisely the problem the class action mechanism was designed to address. *See* Amchem, 521 U.S. at 617.

1.

TPCM's principal argument, which it sounds again and again, is that the probable necessity of individual proof of some of the claimed damages by individual class members prevents Plaintiffs from meeting Rule 23's requirements. Initially, TPCM contends that individualized damages determinations destroy commonality, typicality, and predominance.[5] But Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations. *See* Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment, subdivision (c)(4)) (noting that Rule 23 (c)(4) permits courts to certify a class with respect to particular issues and contemplates possible class adjudication of liability issues with "the members of the class . . . thereafter . . . required to come in individually and prove the amounts of their respective claims."); *see also* 5 *Moore's Federal Practice* § 23.23 [2] (1997) ("The necessity of making an individualized determination of damages for each class member generally does not defeat commonality.").

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[5] TPCM couches this argument as one involving "due process" but cites no authority indicating that this concept applies in this context. In any event, TPCM contends that "due process" requires the district court to conduct an individual inquiry to determine the benefit amount to which each class member was rightfully entitled and if a member was not deprived of any benefit as a result of the Plan's collapse, then TPCM could not be said to be the proximate cause of that member's injury. Substantively, this argument is identical to the contention, discussed in text, that, TPCM must be allowed the opportunity to show that an individual class member did not suffer any damages. As explained above, affording TPCM this opportunity does not destroy Plaintiffs' ability to satisfy the requirements of Rule 23.

Indeed, "[i]n actions for money damages under Rule 23(b)(3), courts *usually* require individual proof of the amount of damages each member incurred." *Id.* at § 23.46 [2][a] (1997) (emphasis added). When such individualized inquiries are necessary, if "common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied." *Id.*

This is precisely the situation here -- "common questions [do] predominate over individual questions as to liability." *Id.* Plaintiffs requested, and the district court certified, class claims against TPCM that rest on a single theory: that TPCM's mismanagement of claims contributed to the ultimate collapse of the Plan and so caused Plaintiffs' damage. Whether TPCM breached its contract to administer and timely pay claims under the Plan, whether Plaintiffs are third party beneficiaries of that contract, whether TPCM otherwise owed a fiduciary duty of care to Plaintiffs, whether it breached that duty, whether it mismanaged claims at all, and whether its mismanagement contributed to the ultimate collapse of the Plan -- are issues common to all potential class members, and do not require any individualized inquiry.

Of these issues, the only one that TPCM even contends is not common to all class members is that of causation. TPCM argues that an individualized inquiry is necessary to determine whether its mismanagement proximately caused Plaintiffs' injury, arguing that Plaintiffs "provided absolutely no credible evidence that any TPCM action or inaction proximately caused damages to them." TPCM's argument fails for several reasons.

First, the sufficiency of the evidence as to proximate cause presented by Plaintiffs goes to the merits of Plaintiffs' case -- an issue the Supreme Court has held courts may not consider in ruling on a motion for class certification. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

Second, to the extent that TPCM argues that *it* was not the proximate cause of the Plan's collapse, the argument actually provides further support for proceeding with this case as a class action. As discussed earlier, class treatment will avert the necessity for hundreds of individual trials in which core issues -- such as TPCM's assertion that it was not a proximate cause of the Plan's collapse -- would be re-litigated, requiring testimony by the same witnesses, duplicative discovery efforts, etc. If TPCM succeeds in establishing that it was not the proximate cause of the Plan's collapse, it will enjoy the preclusive effects of this decision against all class members, rather than be disadvantaged by the asymmetric application of collateral estoppel. *Compare* Fed. R. Civ. P. 23(c)(2)(B) (making class action binding on all members) *with Allen v. McCurry*, 449 U.S. at 95 (noting that collateral estoppel "cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue" (citations omitted)).

Third, to the extent that TPCM's causation argument is that individual inquiry is necessary to establish whether the collapse of the Plan caused Plaintiffs any damages, this is precisely the same argument made by almost all defendants in mass tort cases: determining damages will require an individualized inquiry. Courts have routinely rejected this argument, concluding, as we have in previous cases, that the need for individualized proof of damages alone will *not* defeat class certification. *See Central Wesleyan*, 6 F.3d at 189; *Hill v. W. Elec. Co., Inc.*, 672 F.2d 381, 387 (4th Cir. 1981) ("Bifurcation of . . . class action proceedings for hearings on . . . damages is now commonplace."); *Chisolm v. TranSouth Fin. Corp.*, 184 F.R.D. 556, 566 (E.D. Va. 1999) (collecting cases). As one court explained, "Quantitatively, almost by definition there will always be more individual damages issues than common liability issues . . . . Qualitatively, however, . . . liability issues" may "far exceed in complexity the more mundane individual damages issues." *In re Honda Motor Co.*, 979 F. Supp. 365, 367 (D. Md. 1997); *see also In re Amer. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996) (stating that commonality test is "qualitative rather than quantitative" (citation omitted)). So it is here. The possibility that individualized inquiry into Plaintiffs' damages claims will be required does not defeat the class action because common issues nevertheless predominate.

Moreover, the damage calculations in this case do not appear to be particularly complex, unlike the calculations in those cases in which courts have found that numerous complicated individual damage inquiries predominated over common issues. *Cf. Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66-67, 72 (4th Cir. 1977) (affirming denial of class certification because of overwhelming predominance of thousands of individualized damage questions). In fact, Plaintiffs' claims for punitive damages do not require *any* individualized inquiry at all because this damage calculation would be based solely on *TPCM*'s conduct. In addition, it appears that a court-appointed fiduciary has already calculated most of the Plaintiffs' claims for medical bills using the same computer program that TPCM and Fidelity used to evaluate claims. Thus, in many cases there is likely to be little or no dispute over the amount to which an individual class member is entitled for unpaid medical claims. Similarly, if the court determines that Plaintiffs are entitled to a refund of premiums paid, these amounts could be quickly and easily determined.

Plaintiffs' other damages claims -- those relating to injury to credit, time lost, and loss of enjoyment of life -- may require individualized inquiry. But even considering Plaintiffs' claims against TPCM *as a whole,* we cannot conclude that the district court abused its discretion in finding that at this juncture common issues predominate over the individual issues that may be involved in resolving these claims. We note that the district court was fully aware of the possibility that individual issues, although currently subordinate to the common liability and damage issues, might in time predominate and the case prove unmanageable. The court expressly indicated its resolve to deal with this if it became a problem, and for this reason agreed only to certify the class action conditionally. Such care reflects assiduous respect for Rule 23's requirements, not an abuse of discretion.[6]

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[6] TPCM reasserts its individualized damages argument when contending that the certified class lacks numerosity and superiority. The argument is no more persuasive in those contexts. Indeed, TPCM's repeated attempts to reprise the same argument testify to the fundamental weakness of its contention that the conditional class certification order constituted an abuse of discretion.

2.

TPCM's remaining arguments have even less merit and require little discussion. Specifically, TPCM argues that the named plaintiffs constitute inadequate class representatives because they purportedly lack sufficient knowledge, and because alleged insurmountable conflicts exist within the class. TPCM also contends that the interest of certain individual class members in pursuing individual litigation defeats any argument that a class action provides a superior vehicle for adjudication of the claims. These arguments also fail.

The lack of knowledge contention is particularly meritless. It is hornbook law, as the district court recognized, that"in a complex lawsuit, such as one in which the defendant's liability can be established only after a great deal of investigation and discovery by counsel against a background of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative." J.A. 1256 (quoting 32B Am. Jur. 2d *Federal Courts* § 1888 (1996) (footnotes omitted)); *see also Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000) ("The Supreme Court in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370-74, 15 L. Ed. 2d 807, 86 S. Ct. 845 (1966) expressly disapproved of attacks on the adequacy of a class representative based on the representative's ignorance.").

TPCM's argument as to insurmountable class conflicts fares no better. According to TPCM, the interests of the employer class members conflict with those of the employee class members because employees may wish to sue their employers for unpaid medical bills resulting from the collapse of the Plan.

To defeat the adequacy requirement of Rule 23, a conflict "must be more than merely speculative or hypothetical." 5 *Moore's Federal Practice* § 23.25[4][b][ii] (2002). In this case, no conflict exists that renders the named representatives inadequate. TPCM has not cited a single case in support of its contention that the employees would have viable claims against their employers for unpaid medical bills caused by the failure of a non-ERISA plan, no employee has filed such a claim, and South Carolina's three-year statute of limitations now bars such claims. *See* 7 S.C. Code Ann. § 15-3-530 (West Supp. 2002) (applying three-year statute of limitations to actions for, among other things, breach of contract and fraud).

Furthermore, even if an employee could bring such a claim against its employer, this would not require decertification. For a conflict of interest to prevent plaintiffs from meeting the requirement of Rule 23(a), that conflict "must be fundamental. It must go to the heart of the litigation." 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:14 (4th ed. 2002). Here, the employers and employees share common objectives and the same factual and legal positions. They have the same interest in establishing the liability of TPCM. Thus, any potential conflict does not go to the heart of their roles as class representatives. *See Uniondale Beer Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 340, 343 (E.D.N.Y. 1987) (finding that economic conflict between competitor class members in antitrust action did not render representatives inadequate because all class members sought to prove that defendants conspired to fix prices).[7]

In addition, the dissent suggests a conflict between those Plaintiffs who were not injured by the collapse of the Plan, but have "direct" claims against TPCM for a delay in payment, and those Plaintiffs with

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[7] The dissent insists that an additional conflict exists between the employer class members and the employee class members based on the different remedies sought by each group. *See post* at 84-85. However, [HN12]"potential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy." *Hanrahan v. Britt*, 174 F.R.D. 356, 364 (E.D. Pa. 1997) (internal quotation marks and citation omitted); *see Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977) (finding that representation was adequate even though current gas station lessees and former lessees would ultimately seek different remedies); *see generally* 1 *Newberg on Class Actions* § 3:25, at 422-23 & n.4 (collecting cases). Therefore, any conflict in the forms of recovery sought by these groups of plaintiffs does not warrant decertification.

"indirect" claims against TPCM that derive from the collapse of the Plan. *Post* at 77-81. As the Plaintiffs have made abundantly clear on appeal, however, they do not seek class certification for any direct claims against TPCM. *See, e.g.*, Brief of Appellees at 14 ("Contrary to TPCM's assertions, Plaintiffs do not claim that TPCM improperly adjudicated particular claims. TPCM injured all Plan insureds because it was the cause of the collapse of the Plan."). To be sure, this position appears somewhat at odds with the Plaintiffs' original complaint. However, "the federal rules effectively abolish the restrictive theory of the pleadings doctrine," which held that "a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1219, at 188-89 (2d ed. 1990) (internal quotation marks and citation omitted). *Cf. post* at 80 ("We should take the complaint as written."). This observation seems particularly apropos to actions proceeding under Rule 23, which provides that "an action may be brought *or maintained* as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4)(A) (emphasis added).

Furthermore, even if the Plaintiffs wanted to proceed with direct claims against TPCM, the only claim that the district court certified against TPCM is based on the theory that TPCM caused the collapse of the Plan. *See* J.A. 1249-50 ("Plaintiffs have alleged that

TPCM's mismanagement of processing claims contributed to the failure of the Fidelity Plan. . . . Plaintiff's allegations, if proven, will vitiate any need to demonstrate that a particular claim was submitted prior to the expiration of the contract between TPCM and Fidelity."). Thus, Plaintiffs' counsel did not so much make "a questionable decision . . . to abandon," a theory of liability on appeal, as the dissent suggests, *see post* at 79, as accept the scope of the claim that the district court certified for class treatment.

Finally, the dissent errs in suggesting that the district court's order "*precludes* recovery for those who were in the circumstance where the collapse of the Plan did not cause injury." *Id.* First, the dissent's argument seems premised on the false assumption that under the district court order the Plaintiffs' direct claims would be barred by the rule against claim-splitting. But a class action, "of course, is one of the recognized exceptions to the rule against claim-splitting." 18 *Moore's Federal Practice* § 131.40[3][e][iii] (2002) (citing Restatement (Second) of Judgments § 26(c)(1) (1982)). Second, Rule 23(c)(2) permits members of a class maintained under section (b)(3) to opt out of the class, providing an option for those Plaintiffs who wish to pursue claims against TPCM requiring more individualized inquiry. Thus, rhetoric aside, Plaintiffs with only direct claims are not being "jammed," "sacrificed" or "caught" in any class action against their will. *Post* at 79.[8]

TPCM's final argument is that class members' asserted "interest in individual litigation of the claims" and purported possession of "large damage claims" renders their pursuit of individual actions superior to certification of a class action. This entire argument rests on one fact -- that a single named plaintiff, Mary B. Gunnells, claims $ 70,000 in unpaid medical expenses -- and one contention -- that "at least 17 actions [have been] filed in South Carolina involving the sale and eventual failure of the Fidelity Plan." The district court carefully considered and acted well within its discretion in rejecting this argument.

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[8] We find somewhat disingenuous the dissent's suggestion that we have "done a disservice to an identifiable group of plaintiffs," by exposing them to arguments that their claims are now untimely. *Post* at 80 n.7. First, Plaintiffs with direct claims against TPCM would be equally subject to these arguments under the dissent's proposed resolution of the case. Second, while the dissent is, of course, correct that TPCM could raise a statute of limitations defense against Plaintiffs asserting direct claims, it is far from clear that TPCM would be successful. *Cf. Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983) (holding that [HN16]"'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action,'" and that "once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied" (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974))).

The court found that while Ms. Gunnells claims $70,000 in unpaid medical expenses, "not all of the Plaintiffs' alleged damages are so high and the damages could run the gamut to much lower figures." J.A. 1260. Nothing in the record refutes this finding and we can take judicial notice of the fact that many health care claims will involve dollar amounts that are much lower. Moreover, we note that the size of class members' recovery is hardly determinative of superiority. *See* 5 *Moore's Federal Practice* § 23.48 [2][a] (1997) (noting that when "a class action will provide the most fair and efficient adjudication of a case, such an action may be superior even though class members have sufficient means or incentive to proceed individually"). As to the seventeen already-commenced actions, the district court concluded that their existence did not make individual actions superior in a case involving over 1400 potential litigants. Again, nothing in the record in any way contradicts this common-sense finding. TPCM itself notes that it "has not been named as a Defendant in a single one of those [seventeen] actions," thus raising questions as to whether the existence of those actions is even relevant to class certification against TPCM. Accordingly, we can hardly conclude that in rendering these findings the district court abused its discretion.[9]

C.

In sum, the district court followed the course we charted in *Central Wesleyan*. Its careful analysis of Rule 23's requirements and its detailed factual findings supporting a decision to grant conditional certification against TPCM reveal no abuse of discretion. Of course, we recognize, as the district court did, that this case may ultimately present manageability problems. Nonetheless, we cannot say at this interlocutory stage that the decision to conditionally certify a class action against TPCM constitutes an abuse of discretion, particularly in light of the special deference due trial courts on this issue. *See Central Wesleyan*, 6 F.3d at 185 ("Issues of class action manageability are properly committed to the district court's discretion, because that court 'generally has a greater familiarity and expertise' with the 'practical . . . and primarily . . . factual' problems of administering a lawsuit 'than does a court of appeals.'" (quoting *Windham*, 565 F.2d at 65)). If the district court's current assessment turns out to be inaccurate, and it becomes apparent that individual damage issues will predominate or render the case unmanageable, the court undoubtedly will recognize its responsibility to decertify the class. We note also that in conditionally certifying the class the court specifically stated that it intended to "heed[] the Fourth Circuit's warning to keep a watchful vigil in a complicated case such as this one to 'make certain that manageability and other types of problems do not overwhelm the advantage of conditional certification.'" J.A. 1260 (quoting *Central Wesleyan*, 6 F.3d at 189). Indeed, the court expressly noted that "should such concerns render the class mechanism ineffective, the district court must be prepared to use its considerable discretion to decertify the class." *Id.* at 1260-61. We are confident that the court will do precisely this, if necessary.[10]

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[9] The dissent's effort to analogize this case to *Lienhart*, and to assert that we ignore "the complex question of comparative fault" arises from the same misperception regarding separate Plaintiff classes that animates the dissent's argument with respect to conflicts among Plaintiff classes. *See post* at 80, 86. Because there is only a single Plaintiff class with a single cause of action -- that TPCM's mismanagement contributed to the demise of the Plan -- issues of comparative fault will require no individual inquiry apart from that required to calculate damages. The extent to which TPCM's conduct contributed to the collapse of the Plan, and the comparative fault of intervening parties, such as Fidelity, will be the same for every Plaintiff. In *Lienhart*, 255 F.3d at 149, by contrast, the intervening actors and the intervening acts were different for every plaintiff, thereby creating the possibility that the defendant's degree of liability would be different with respect to every plaintiff.

IV.

The district court also granted, in substantial part, Plaintiffs' motion for class certification against the individual agents responsible for marketing and selling the Plan. Although the court refused to certify a class as to Plaintiffs' conspiracy and RICO claims, concluding that individual issues predominated, it did conditionally certify Plaintiffs' claims based on four other theories of liability: negligent undertaking, fraud, negligent misrepresentation, and breach of contract. The court organized its certification of these claims into subclasses -- one for each of the twenty-three agents who had marketed insurance to a named plaintiff. Each subclass was permitted to pursue its four theories of liability via a separate class action.

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[10] TPCM makes two ancillary arguments that we need address only briefly. First, it asserts that the district court improperly relied on affidavits of principals of the Fidelity Defendants, whom TPCM could not examine because it was not a defendant in this case when the affiants were deposed, and the New York court later stayed all proceedings against the Fidelity Defendants. This argument rests on a faulty premise, *i.e.*, that TPCM was unable to depose the affiants. In fact, we do not know whether TPCM could have deposed the affiants because it never sought to do so. Second, TPCM asserts that the district court's ruling rested on erroneous facts. Even if it could show that these factual findings were "clearly erroneous," it has utterly failed to demonstrate that any of these errors affected its substantial rights. *See* Fed. R. Civ. P. 61

Once again, we accord the district court's class certification decision substantial deference. Nevertheless, in this instance, we believe the court abused that discretion. The individual class actions certified against the Agents simply cannot satisfy Rule 23's predominance and commonality requirements.[11] This is so because Plaintiffs' claims against the individual Agents require proof of elements not necessary to their single claim against TPCM; and a number of these additional elements can only be established after considerable individual inquiry. Although the district court apparently recognized this as a general matter, it misunderstood or ignored controlling legal principles in holding that in this case such individual determinations would not be necessary and so common issues would predominate. In doing so, "the district court abused its discretion by . . . misapprehending the law with respect to underlying issues." *See Quince Orchard Valley Citizens Ass'n v. Hodel,* 872 F.2d 75, 78 (4th Cir. 1989) (internal quotation marks and citations omitted).

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[11] In addition, we note our reservations about the district court's determination as to compliance with the numerosity requirement, *see* J.A. 1265 (noting that some Agent subclasses have as few as eight class members), and the superiority requirement, *compare* J.A. 1271 (holding the South Carolina Department of Insurance's current administrative proceeding to revoke the Agents' licenses has "no bearing . . . on this proceeding") *with* 5 *Moore's Federal Practice* § 23.49[3] (1997) (noting that "if a governmental unit has brought suit on the same issue, a court may decide that the proposed class action is unnecessary and an inferior method of adjudication"). We need not address these issues, however, because *all* of Rule 23's requirements must be met. Therefore, our conclusion that the class fails to meet the commonality and predominance requirements is dispositive in this case.

A.

The first reason why common issues do not predominate in Plaintiffs' claims against the Agents is the need for individual inquiry into the issue of reliance. Indisputably, negligent misrepresentation and fraud require proof of reliance. *See Robertson v. First Union Nat'l Bank,* 350 S.C. 339, 565 S.E.2d 309, 313-14 (S.C. Ct. App. 2002) (recounting elements of negligent misrepresentation and fraud claims under South Carolina law). To establish fraud, a plaintiff must prove, *inter alia,* that the hearer relied on the truth of a fraudulent statement, and had a right to rely thereon. *Id.* To establish negligent misrepresentation, a plaintiff must prove, *inter alia,* that the plaintiff "justifiably relied on [a false] representation; and . . . the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *Id.* at 314. Thus, both theories of liability require that the plaintiff demonstrate (1) actual reliance *and* (2) that the plaintiff had a right to rely on the misstatement (in the case of fraud) or that such reliance was justifiable under the circumstances (in the case of negligent misrepresentation). Almost inevitably, establishing these elements requires an individualized inquiry.

As we held in *Broussard*, "the reliance element of . . . fraud and negligent misrepresentation claims [is] not readily susceptible to class-wide proof;" rather, "proof of reasonable reliance . . . depends upon a fact-intensive inquiry into what information each [plaintiff] actually had." *Broussard*, 155 F.3d at 341. Nor are we alone in so holding. *See, e.g., Andrews v. AT&T*, 95 F.3d 1014, 1025 (11th Cir. 1996) (decertifying class in part because "the plaintiffs would . . . have to show, on an individual basis, that they relied on the misrepresentations, suffered injury as a result, and incurred a demonstrable amount of damages"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (concluding that "a fraud class action cannot be certified when individual reliance will be an issue").

The district court nevertheless found that the required proof of reliance in this case would not require an individual "fact-intensive inquiry" sufficient to render class certification improper, but instead found that actual reliance could be "presumed" and the right to rely "assumed." Those findings are grounded on a misunderstanding of controlling law.

1.

First, the district erred in suggesting that *Basic Inc. v. Levinson*, 485 U.S. 224, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988), supports a presumption of actual reliance in this case. *See* J.A. 1268 and n.27 ("[A] common sense approach presuming reliance exists may be acceptable in this circumstance.") (citing *Basic*, 485 U.S. at 246-47). In fact, neither *Basic*, nor any other precedent, supports a presumption of actual reliance in the case at hand.

Basic involved a shareholders' suit alleging that a company made material misrepresentations about the status of merger talks. In opposing class certification, the company argued that common issues did not predominate because each shareholder had to establish reliance on the misrepresentation in making decisions to buy or sell the stock. The Supreme Court rejected this argument, reasoning that "because most publicly available information is reflected in market price, an investor's reliance on any material misrepresentations . . . may be presumed for purposes of a Rule 10b-5 action." *Basic*, 485 U.S. at 247. This presumption was based on the "fraud-on-the-market theory," *i.e.*, even if an individual investor was not aware of the misrepresentation (and therefore did not directly "rely" on it in the traditional sense), the market price of the stock reflected the misrepresentation, thereby providing "the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury" that is the touchstone of reliance. *Id.* at 243. In *Basic*, therefore, the capacity of the capital markets to rapidly assimilate public information into stock prices provided the basis for presuming a causal connection between a material misrepresentation and a plaintiff's injury, even when that plaintiff may have been completely unaware of the misrepresentation (let alone "relied" on it in the traditional sense). By contrast, Plaintiffs' allegations of fraud and misrepresentation offer no substitute for actual reliance to establish such a causal connection. Rather, if an individual plaintiff in this case were unaware of the alleged misrepresentations, but nevertheless purchased the Plan, we see no basis for presuming that the misrepresentations nevertheless were a proximate cause of her damages. Absent this presumption, individualized inquiry will be required to show that Plaintiffs actually relied on the Agents' alleged misrepresentations.

2.

The district court also erred in concluding that individualized inquiry would not be necessary to establish the second element of reliance -- that Plaintiffs had a right to rely on the Agents' alleged misrepresentations or that reliance was justified.

The court held that "under South Carolina law, such reliance on an insurance agent is reasonable," J.A. 1268 (citing *Trotter v. State Farm Mut. Auto Ins. Co.*, 377 S.E.2d 343, 351 (S.C. Ct. App. 1988), for the proposition that it is "reasonable for [an] insured to assume the truthfulness of" an insurance agent's representations). But in fact, South Carolina law only holds that "it is reasonable for the insured to assume the truthfulness of" his agent's representations under limited circumstances not present in this case -- and, indeed, not present in *Trotter* either. *See Trotter,* 377 S.E.2d at 350-51 (concluding that reliance was not reasonable and distinguishing circumstances from those of *Giles v. Lanford & Gibson, Inc.,* 285 S.C. 285, 328 S.E.2d 916 (S.C. Ct. App. 1985)).

Thus, in *Giles,* South Carolina's intermediate appellate court held that when the unintelligible language of a written agreement would prevent an insured from discovering the falsity of an insurance agent's representation, it is reasonable for the insured to assume the truthfulness of the insurance agent's oral misrepresentation of the written agreement. *Giles,* 328 S.E.2d at 918-19. Because the case at hand, like *Trotter,* does not involve allegations of oral misrepresentations, or a written agreement so unintelligible that Plaintiffs could not have reasonably discovered any falsity of representation by reading the policy, the *Giles* "assumption" has no bearing here. As even the *Giles* court noted, it has long been the law in South Carolina that:

> whether or not reliance upon a representation in a particular case is justifiable or excusable, what constitutes reason able prudence and diligence with respect to such reliance, and what conduct constitutes a reckless or conscious failure to exercise such prudence, *will depend upon the various circumstances involved,* such as the form and materialty (sic) of the representations, the respective intelligence, experience, age, and mental and physical condition of the parties, and the relation and respective knowledge and means of knowledge of the parties.

Id. at 918 (quoting *Thomas v. Am. Workmen,* 197 S.C. 178, 14 S.E.2d 886, 888 (S.C. 1941) (emphasis added)). Thus, the district court misconstrued South Carolina law when it concluded that Plaintiffs' right to rely on the Agents' misrepresentations could be assumed without inquiring into the individual circumstances of each plaintiff's case.

Therefore, we conclude that the district court abused its discretion in finding that justifiable reliance could be assumed or presumed in this case. Absent this assumption or presumption, individual issues clearly predominate. As the Supreme Court recognized in *Basic,* 485 U.S. at 242, "requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented [plaintiffs] from proceeding with a class action, since individual issues then would have overwhelmed the common ones." *Accord Broussard,* 155 F.3d at 341.[12]

B.

A second reason why common issues do not predominate in Plaintiffs' claims against the Agents relates to the duty owed to Plaintiffs by the Agents. Plaintiffs' contentions of negligent undertaking are based on the Agents' alleged failure in their "duty to properly inform Plaintiffs and other members of the class about the value, quality, and extent of coverage" provided under the Plan. These contentions also require individualized inquiry.

Generally, under South Carolina law, an insurance agent does *not* have any duty to advise an insured. *See Pitts v. Jackson Nat'l Life Insur. Co.,* 352 S.C. 319, 574 S.E.2d 502, 510 (S.C. Ct. App. 2002) (citing *Trotter,* 377 S.E.2d at 347). A duty may be imposed, however, "if the agent, nevertheless, undertakes to advise the insured." *Carolina Prod. Maint., Inc. v. United States Fid. & Guar. Co.,* 310 S.C. 32, 425 S.E.2d 39, 43

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[12] Of course, proof of individual reliance need not overwhelm the common issues in every case. However, considering the centrality of the Plaintiffs' allegations involving reliance, and the other issues requiring individual inquiry, common issues clearly do not predominate in this case.

(S.C. 1992) (citing *Trotter,* 377 S.E.2d at 347). Absent an express undertaking to assume such a duty (and Plaintiffs do not contend that the Agents expressly undertook such a duty here), a duty can be impliedly created. *Id.* But in determining if an implied duty has been created, courts must consider several factors, including whether: "(1) the agent received consideration beyond a mere payment of the premium, . . . (2) the insured made a clear request for advice, . . . or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on." *Id.* (citing *Trotter,* 377 S.E.2d at 347). Obviously, consideration of these factors -- and thus proof of any implied duty -- requires an inquiry into the facts of each particular case.

When certifying subclasses against the Agents, however, the district court ignored these legal principles. On appeal, Plaintiffs cannot. They must, and do, acknowledge them. They maintain, however, that the principles articulated in *Trotter* and *Carolina Production* apply only to insurance *agents* and that the defendant Agents are insurance *brokers,* who, Plaintiffs assert, "do have a special duty to their clients."

But Plaintiffs' argument -- that the Agents were really "insurance brokers" -- rests on a flawed premise. Under South Carolina law, an "insurance broker" represents people seeking insurance, while an "insurance agent" represents the insurance company.

See S.C. Code §§ 38-1-20, 38-43-10 (2002); *see also Allstate Ins. Co. v. Smoak*, 256 S.C. 382, 182 S.E.2d 749, 753-54 (S.C. 1971) (distinguishing between insurance brokers and agents on basis of whether employed by person seeking insurance or by insurance company to solicit and write insurance). In this case, the district court specifically found that the Agents are licensed "insurance agents" who marketed and sold the Plan. Plaintiffs point to nothing in the record to support their contention that the Agents were actually "insurance brokers."[13] Accordingly, we can hardly ignore *Trotter* and *Carolina Production* and the individualized proof inquiries those cases require.

C.

In addition to the individualized determinations inherent in Plaintiffs' claims against the Agents, the affirmative defenses of comparative negligence, assumption of risk, and set-off asserted by the Agents pose significant obstacles to class certification. Similarly, even if actual, justifiable reliance could be presumed, the Agents would still be permitted to introduce evidence to rebut this presumption with respect to individual plaintiffs. *See Banca Cremi v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1036 (4th Cir. 1997)

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[13] Plaintiffs' broker versus agent distinction is surprising given their heavy reliance on *Trotter*, a case involving an insurance *agent*, for the argument discussed in Part IV.A.2.

(citing *Carras v. Burns*, 516 F.2d 251, 257 (4th Cir. 1975), for proposition that the inference of reliance is rebuttable). The district court again ignored the problems for class certification posed by these defenses.

On appeal, Plaintiffs maintain that "numerous courts" have rejected the notion that the assertion of affirmative defenses renders class certification inappropriate. However, they cite only *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 138 (2d Cir. 2001), in which the Second Circuit merely stated that the presence of affirmative defenses does not "automatically" render class certification inappropriate. Rather, like other considerations, affirmative defenses must be factored into the calculus of whether common issues predominate. *Id.* at 138.

Moreover, regardless of other courts' interpretations of Rule 23, we have flatly held that "when the defendants' affirmative defenses . . . may depend on facts peculiar to each plaintiff's case, class certification is erroneous." *Broussard*, 155 F.3d at 342 (citation and internal quotation marks omitted). Although it is difficult to determine with any precision, it appears that here the Agents' affirmative defenses are not without merit and would require individualized inquiry in at least some cases. Therefore, they may, indeed, "depend on facts peculiar to each plaintiff's case." Accordingly, "class certification was erroneous." *Id.* at 342.

D.

Given the need for individual inquiry into these issues, we must hold that the class actions certified by the district court against the Agents do not meet the commonality and predominance requirements of Rule 23. Thus, the district court abused its discretion in conditionally certifying these class actions.

V.

Finally, we turn to a contention never raised by any of the parties: our dissenting colleague's "threshold" argument, *post* at 58, that even if common issues do predominate in Plaintiffs' cause of action, as a whole, against TPCM -- *i.e.*, "that TPCM violated its duties, both contractual and at law, as third party administrator of the Plan and such conduct was a cause of the Fidelity Plan's failure," and that "failure directly injured Plaintiffs and the absent class members," J.A. 1249 -- the district court erred in confining its predominance inquiry to that cause of action. The dissent steadfastly contends that the district court should instead have evaluated whether common issues predominated in the *entire* "action taken *as a whole*." *See post* at 53 (emphasis in original); *see also id.* at 54, 61 ("the case as a whole"); 57, 58, 59, 60, 61 ("the action as a whole"); and 62 ("the entire action"). According to the dissent, a district court must first "determine that" an entire law suit "as [a] whole" (i.e. not only the cause of action against TPCM but also the very different causes of action asserted against the Agents) satisfies the predominance and superiority requirements imposed by 23(b)(3) *and only if the entire lawsuit does satisfy these requirements* may a court "manage[ ] through orders authorized by 23(c)." *See id.* at 64. The dissent's argument finds no support in the law -- not in Rule 23 itself nor in any case or treatise. Indeed, in addition to ignoring the plain language of Rule 23, and rendering a subsection of the rule superfluous, the dissent's argument is contrary to the Supreme Court's interpretation of Rule 23, our own precedent and that of every other court (including eight federal appellate courts), and every scholarly treatise that has addressed the issue.

First, the dissent's rigidly sequential approach ignores the plain language of the rule. Rule 23(c)(4) provides that:

> *[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues,* or (B) a class may be divided into subclasses and each subclass treated as a class, *and the provisions of this rule shall then be* construed and *applied* accordingly.

Fed. R. Civ. P. 23(c)(4) (emphasis added). Thus, Rule 23 specifically dictates that "when appropriate" a class action may be "maintained" as to "particular issues" and, *after* that is done, "the provisions of this rule," such as the predominance requirement of (b)(3), "shall *then* . . . be construed and applied." *Id.* (emphasis added). The dissent's approach -- that a court first determine "that the *action* as [a] whole satisfies the predominance and superiority requirements imposed by 23(b)(3)" and only then employ subsection 23(c)(4), *post* at 64, simply ignores Rule 23 (c)(4)'s express command.[14] Of course, courts have no discretion to ignore the plain language of a statute or federal rule. *See, e.g., United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 454, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993) (noting that "plain meaning must be enforced, of course").

Moreover, the dissent's approach would render subsection (c)(4) of Rule 23 superfluous. The dissent would require a court considering the manageability of a class action -- a requirement for predominance under Rule 23(b)(3)(D) -- to pretend that subsection (c)(4) -- a provision specifically included to make a class action more manageable -- does not exist until after the manageability determination is made. Thus, under the dissent's reading of Rule 23, a court could only use subsection (c)(4) to manage cases that the court had already determined would be manageable *without* consideration of subsection (c)(4). This reading leaves subsection (c)(4)(A) without any practical application, thereby rendering it superfluous. *See In re Tetracycline Cases*, 107 F.R.D. 719, 726-27 (W.D. Mo. 1985) ("If the requirement under Rule 23(c)(4)(A) was that . . . one or more issues 'predominate' in the usual Rule 23(b) sense, when compared with *all* the issues in the case, there would obviously be no need or place for Rule 23(c)(4)(A)." (emphasis in original)). Such an interpretation of Rule 23 contravenes the well-established prohibition against reading a provision in a manner that would make any "clause, sentence, or word . . . superfluous, void, or insignificant," *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 151 L. Ed. 2d 339, 122 S. Ct. 441 (2001) (internal quotation marks and citations omitted).

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[14] The Advisory Committee on Civil Rules has recognized subsection (c)(4)'s force despite its placement after (b)(3). Thus, in 1995 the Advisory Committee considered amending (c)(4) to read, "an action may be certified as a class action with respect to particular claims, defenses, or issues . . ." *because* "the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions." *See* Edward H. Cooper, *Class Actions and the Rulemaking Process: Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. Rev. 13, 56, 58 (1996) (quoting Proposed Amendments to Rules of Civil Procedure, Class Actions (Feb. 1995 Draft)).

In addition to ignoring Rule 23's plain language and rendering a part of it superfluous, the dissent's rigid, sequential reading of the rule conflicts with controlling precedent. The Supreme Court has refused to read Rule 23 in the strictly sequential fashion advocated by the dissent. To the contrary, in its most recent discussion of Rule 23(c)(4), *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856, 144 L. Ed. 2d 715, 119 S. Ct.

2295 (1999), the Court suggested that a district judge could *initially* act pursuant to subsection (c)(4) to create subclasses so as to satisfy the previously listed requirements of subsection (a)(4). Indeed, the *Ortiz* Court pointed out that this result "is obvious after *Amchem*," the case on which the dissent so heavily relies for its theory. *See id.* (noting that "it is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to *eliminate conflicting interests* of counsel." (citing *Amchem*, 521 U.S. at 627 (emphasis added))). Although the dissent claims otherwise, if its interpretation of Rule 23 is followed, *Ortiz* notwithstanding, a court could never use subsection (c)(4) to divide plaintiffs into homogeneous subclasses "to eliminate conflicting interests of counsel," *id.*, because plaintiffs' "entire action" "as a whole" would not satisfy the adequacy of representation requirement of Rule 23(a)(4), and would therefore never "pass through the gate[ ]" of Rule 23(a). *Post* at 58; *see also id.* at 57 (noting that an action must first satisfy "the requirements of Rule 23(a)" before a court can employ (c)(4)).[15] Despite its lengthy attempt to analogize *Amchem* to the case at hand, in an effort to find some support for its gatekeeper theory, *see post* at 59-61, the dissent fails to take into account the Supreme Court's own characterization and application of *Amchem* in *Ortiz*.

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[15] Of course, *Ortiz* involves subclasses under Rule 23(c)(4)(B), while the case at hand involves certification of particular issues under (c)(4)(A), but nothing in Rule 23 suggests that (c)(4)(A) does not interact with the other subsections of Rule 23 in the same fashion as (c)(4)(B).

Moreover, the dissent acknowledges, but then disregards the import of the conclusion of the *Amchem* Court itself that "settlement *is relevant* to a class certification," and that Rule 23(e) affects a court's evaluation of predominance. 521 U.S. at 614 (emphasis added). The Supreme Court explained in *Amchem* that when dealing with a settlement-only class pursuant to Rule 23(e), "a district court *need not inquire* whether the case, if tried, would present intractable management problems," which would ordinarily be necessary to satisfy Rule 23(b)(3)'s predominance requirement. *Id.* at 620 (emphasis added) (citing Fed. R. Civ. P. 23(b)(3)(D)). The dissent thus ignores the lesson of *Amchem* most relevant to the dissent's "threshold" contention in the case at hand, *i.e.*, the Supreme Court's recognition that the subsections of Rule 23 are *interactive*, and not to be followed, as the dissent suggests, in a strictly *sequential* fashion. In sum, in its two most recent class action decisions, *Ortiz* and *Amchem*, the Supreme Court eschewed the dissent's suggested approach of reading each of Rule 23's provisions sequentially.

Additionally, precedent from our own court flatly rejects the dissent's sequential interpretation of Rule 23. In *In re A.H. Robins*, 880 F.2d at 740, we counseled that "courts should take full advantage of the provision in subsection (c)(4) permitting class treatment of separate issues in the case." We expressly recognized that "*if [an] action includes multiple claims, one or more of which might qualify as a certifiable class claim, the court may separate such claims* from other claims in the action *and certify them* under the provisions of subsection (c)(4)," provided that "each subclass must independently meet all the requirements of (a) and at least one of the categories specified in (b)." *Id.* at 728 (emphasis added). Thus, contrary to the dissent's protests in this case, we do not espouse a new rule. Rather we follow the rule articulated in *A.H. Robins* -- that subsection 23(c)(4) should be used to separate "one or more" claims that are appropriate for class treatment, provided that within that claim or claims (rather than within the entire lawsuit as a whole), the predominance and all other necessary requirements of subsections (a) and (b) of Rule 23 are met.

Nor are we alone. Not a single court has followed the dissent's approach. Several courts and a number of distinguished commentators have *explicitly* endorsed a broad *issue*-specific predominance analysis of Rule 23. *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under

Rule 23(c)(4)(A) and proceed with class treatment of these particular issues." (citations omitted)); *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 28-31 (E.D.N.Y. 2001) (Weinstein, J.) ("The framers of Rule 23(c)(4)(A) considered class actions brought under Rule 23(b)(3) . . . particularly well suited for certification of fewer than all issues. Their conclusion follows from the fact that Rule 23(c)(4)(A) assists in satisfying Rule 23(b)(3)'s additional class certification requirements of predominance and superiority." (citations omitted)); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 395 (D. Kan. 1998) (explaining that Rule 23(c)(4)(A) permits "adjudication of any issues common to the class even though the entire litigation may not satisfy the requirements of Rule 23"); 6 *Newberg on Class Actions* § 18:7 ("Even cases which might not satisfy the predominance test when the case is viewed as a whole may sometimes be certified as a class limited to selected issues that are common, under the authority of Rule 23(c)(4)."); 7B Wright & Miller, *Federal Practice and Procedure* § 1790 ("Subdivision (c)(4) is particularly helpful in enabling courts to restructure complex cases to meet the other requirements for maintaining a class action. . . . The theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member.").

All other courts have explicitly or implicitly endorsed an interpretation of (c)(4) that considers whether Rule 23's predominance requirement is met by examining *each cause of action* independently of one another, not the entire lawsuit, as the dissent would. *See, e.g., Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 38-43 (1st Cir. 2003) (reversing decertification of two out of three decertified claims and affirming decertification with respect to third claim); *Piazza v. EBSCO Industries, Inc.*, 273 F.3d 1341, 1349, 1351-53 (11th Cir. 2001) (finding "no basis for concluding that the district court abused its discretion by certifying a class against the EBSCO Defendants on" claim for breach of fiduciary duty for lost profits but finding abuse of discretion for certification of stock sale and undervaluation claims against EBSCO and reversing class certification with respect to claims against another defendant, Price Waterhouse Cooper); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 154 (2d Cir. 2001) (evaluating plaintiffs' disparate impact claim separately from pattern-or-practice disparate treatment claim); *Becherer v. Merrill Lynch*, 193 F.3d 415, 430 (6th Cir. 1999) (*en banc*) (Moore, J., concurring in the judgment) (noting that district court "properly certified a class with respect to the contract claims" against one defendant, without ruling on fraud and other claims against multiple defendants); *id.* at 428 (majority opinion) (noting without disapproval that "the district court reached the class certification question with respect to the contract issues, but not the remaining claims"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998) (conducting an *independent* predominance inquiry for each cause of action); *Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 544 (D.N.J. 1999) ("This court . . . has previously rejected the notion that class certification under Rule 23 is 'an all-or-nothing proposition' requiring class certification of all causes of action asserted in a single pleading." (citations omitted)); *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279, 289 & n.4, 295 (D.N.J. 1997) (granting class certification for antitrust claims, denying certification for claims of statutory and common law fraud, breach of duty of good faith and fair dealing, unjust enrichment, and money had and received, and noting that"differential treatment of claims is permitted by Rule 23(c)(4)" and that no cases suggest "that class certification of all asserted causes of action is an all-or-nothing proposition"); *Hudson v. Capital Mgmt. Int'l, Inc.*, 565 F. Supp. 615, 630-31 (N.D. Cal. 1983) (granting class certification for statutory claims of fraud and negligent misrepresentation and denying certification for common law claims despite recognizing that "individual questions of law and fact would vastly overshadow any common questions if the court were to certify classes based on the common law claims"); *Lewis v. Capital Mortgage Invs.*, 78 F.R.D. 295, 307 (D. Md. 1978) (granting class certification for securities law claims but excluding common law fraud claim from class action certification); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561 (S.D. Fl. 1973) (granting class certification for negligent exposure cause of action but not breach of contract, breach of implied warranty, or inadequate medical treatment causes of action); *see also* Hannah Stott-Bumsted, Note, *Severance Packages: Judicial Use of Federal Rule of Civil Procedure 23(c)(4)(A)*, 91 Geo. L.J. 219, 231 (2002) (observing that "there is little dispute" that certification of a single claim in a suit where plaintiffs assert multiple claims "is an acceptable use of the district court's discretion under Rule 23(c)(4)(A).")

Indeed, the Third Circuit has twice reversed district courts for taking the dissent's approach and failing to consider class certification of individual claims. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 453 (3d Cir. 1977) ("Even assuming that the court were correct in its conclusion that the lease claim is not appropriate for class determination, it nevertheless should have considered certification of the trademark claim under Rule 23(c)(4)(A)."); *Geraghty v. United States Parole Comm'n*, 579 F.2d 238, 252-53 (3d Cir. 1978) (rejecting district court's conclusion "that a class action is inappropriate" because "not all of the grounds of action alleged in the complaint are applicable to the [proposed] class" because that conclusion "does not properly acknowledge the powers and duties of the trial court under section (c)(4) of Rule 23"), *vacated on other grounds*, 445 U.S. 388, 402-03, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980).

Again, *no* court has adopted the dissent's interpretation of Rule 23; no court has required a *lawsuit*-specific predominance analysis. Thus, the dissent's attacks on our approach are as baffling as they are illfounded. The dissent's contention that our approach "bypasses" and "subverts" Rule 23(b)(3)'s predominance requirement, and "strips Rule 23(b)(3) of its meaning," *post* at 56, 59 and 61, is simply false. We have scrupulously analyzed whether Plaintiffs' claims against TPCM and the Agents satisfy the predominance requirement. *See ante* at 13-14, 17-20, 27-33. After doing so, we have concluded that Plaintiffs' cause of action against TPCM -- "that TPCM violated its duties . . . as third party administrator of the Plan," which caused "the Plan's failure" and so "directly injured Plaintiffs" J.A. 1249 -- taken as a whole, satisfies all of Rule 23's requirements, including predominance, *ante* at 13-14, 17-20.[16] That the dissent reaches a different conclusion as to whether common issues predominate with respect to Plaintiffs' claim against TPCM does not mean that we "strip[ ] Rule 23(b)(3) of its meaning;" it just means that the dissent disagrees with our assessment. Indeed, the continuing vitality of Rule 23(b)(3)'s predominance requirement dictated our reversal with respect to Plaintiffs' claims against the Agents -- a decision *with which the dissent concurs.*

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[16] Thus, contrary to the dissent's contention, *post* at 60, there is no reason to "wonder exactly what" the common issues in the certified cause of action against TPCM "predominate over;" they predominate over the individual issues involved *in that cause of action.*

The dissent offers an equally perplexing response to the wealth of authority cited above, including cases from the First, Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits, all of which have rejected the dissent's contentiòn that a class can be certified only if the common issues in "the entire action" -- *i.e.*, every cause of action against every defendant -- predominate over individual issues in "the entire action." The dissent does not discuss, let alone distinguish, most of the cases we cite; it simply maintains that they do not exist. *See post* at 63 (dissent noting it can "identify" no circuit precedent supporting the majority's holding).[17]

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[17] Pointing to the various theories of liability alleged in Plaintiffs' complaint against twenty-three agents and TPCM, the dissent surprisingly asserts that each of these theories constitutes *a cause of action* and that the certified claim against TPCM is simply a "common question." *See post* at 62. Even if this were so, it is unclear how this contention aids the dissent -- for the predominance inquiry would still be conducted within the confines of these "causes of action" not the lawsuit as whole, as the dissent would. *See, e.g.*, Allison, 151 F.3d at 421-22. In fact, the dissent's contention is a red herring. A cause of action is "defined by its factual contours" and is "'coterminous with the transaction regardless of the number of substantive theories . . . that may be available to the plaintiff.'" *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187, 194, 200 (3d Cir. 1999) (quoting Restatement (Second) of Judgments § 24 cmt. a). Thus "claims are part of the same cause of action when they arise out of the same transaction . . . or the same core of operative facts." *Grausz v. Englander*, 321 F.3d 467, 473 (4th Cir. 2003) (internal quotation marks omitted). Certainly, in some cases, each theory of liability arises from a different set of operative facts and so constitutes part of a different

Just as confounding, is the dissent's contention that the Fifth Circuit has adopted the dissent's approach and that we, in assertedly refusing to follow the Fifth Circuit, create a circuit conflict. *See post* at 53-54, 62-63 (citing *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001), *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), and *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)). In fact, the Fifth Circuit cases do not state, let alone hold, as the dissent would, that "the entire action," or "the action as a whole" -- *i.e.*, all causes of action against all parties -- must satisfy Rule 23 (b)(3)'s predominance requirement before a court can employ Rule 23(c)(4) to certify a class. Rather, the Fifth Circuit cases merely require that "*a cause of action, as a whole,* must satisfy rule 23(b)(3)'s predominance requirement" before "rule 23(c)(4) is available." *See*

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cause of action. But here, although Plaintiffs assert several theories of liability against TPCM, all of these theories arise from a single set of "operative facts" and so are part of a single cause of action -- that TPCM mismanaged administration of the Plan resulting in the Plan's failure to timely pay out benefits. Moreover, Plaintiffs assert different causes of action, arising from a very different set of "operative facts," against the Agents -- that the Agents misrepresented the Plan's features leading the Plaintiffs to purchase a woefully deficient Plan. Notably, neither TPCM nor any other defendant challenges the district court's clearly proper treatment of Plaintiffs' claim against TPCM as a single cause of action separate and independent from their claims against the agents.

Smith, 263 F.3d at 409 (emphasis added); *Allison*, 151 F.3d at 421-22; *Castano*, 84 F.3d at 745 n.21.[18] To be sure, as the Second Circuit has noted, there is a circuit conflict as to whether predominance must be shown with respect to an entire cause of action, or merely with respect to a specific issue, in order to invoke (c)(4). *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167 n.12 (2d Cir. 2001) (noting the Fifth Circuit's "strict application of the (b)(3) predominance inquiry to the entire pattern or practice claim" before a court can invoke (c)(4) and further noting that "an alternative understanding of the interaction of (b)(3) and (c)(4) . . . has been advanced elsewhere" including by the Ninth Circuit in *Valentino*, 97 F.3d at 1234. But we have no need to enter that fray (and similarly the dissent's ruminations about "pinhole" issue certification have no relevance here) because, as we have demonstrated within, in this case. Plaintiffs' *cause of action* as a whole against TPCM satisfies the predominance requirements of Rule 23. Thus even if the view adopted by the Fifth Circuit (that predominance must be established within a given cause of action to invoke (c)(4)) rather than that of the Ninth Circuit (that this is not necessarily required) constituted the law of this circuit, our holding here would be in full accordance with the Fifth Circuit view.

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[18] The dissent fundamentally errs in suggesting that we engage in some sort of "wordsmithery" in noting this important distinction between the Fifth Circuit's view and the dissent's approach. *See post* at 63. In fact, the Fifth Circuit itself has made plain that it means exactly what it has said -- a court is to determine that predominance is satisfied when assessing each "cause of action, as a whole," *not* the entire lawsuit, as a whole, as the dissent posits. For example, in Allison, 151 F.3d at 407, 409, African-American plaintiffs charged employment discrimination and sought class certification of two causes of action: (1) a claim of systemic disparate treatment by their employer resulting in a pattern or practice of intentional discrimination and (2) a claim of disparate impact arising from a facially neutral employment policy. The Fifth Circuit analyzed each of these claims *separately* in determining whether (b)(3)'s predominance requirement had been met. Id. at 420-25. In looking at the *first cause of action* -- the disparate treatment/pattern or practice claim -- the court held that the "first stage of the pattern or practice claim" could not be divorced from its "second stage" for the predominance analysis. Id. at 421-22. Instead, the court conducted the predominance inquiry by looking at the pattern or practice claim *as a whole*, and found that common issues did not predominate with respect to *that cause of action*. *Id.* Although the different parts of the disparate treatment/pattern or practice *cause of action* could not be "severed," the court conducted a completely independent predominance analysis for the *second cause of action* -- the disparate impact claim -- to assess, as it said, "the possibility of certifying a class action *only on the disparate impact claim*." Id. at 422 (emphasis added). This is precisely the approach we have followed; it is the majority, not the dissent, that the Fifth Circuit precedent supports.

In fact, we are aware of no decision by any court that has adopted the dissent's view that in cases such as the one before us, involving more than one cause of action, a court must evaluate predominance in the context of the "action taken as a whole" or the "case as a whole." *Post* at 53 and 54. On the contrary, as discussed above, it is the dissent's approach that would create a direct conflict with all other courts, and abrogate longstanding precedent and practice in the area of class action law. *See ante* at 35-40.

Finally, the dissent errs in predicting a "procedural nightmare" on remand. *See post* at 56. The class action certified by the district court against TPCM involves a single, straightforward cause of action consisting of three questions common to all Plaintiffs -- whether "TPCM violated its duties . . . as third party administrator of the Plan," whether "such conduct was a cause of the Fidelity Plan's failure," and whether "that failure directly injured Plaintiffs and the absent class members." J.A. 1249. Neither of the first two questions require any individual inquiry, and the third question may require nothing more than a ministerial determination that can be made simply and quickly. We are confident at this stage that proceeding with this cause of action on a class-wide basis will "'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *See Amchem*, 521 U.S. at 615 (citation omitted).[19] Moreover, it is important to remember that we are only approving a *conditional* certification of the case, and that the district court has explicitly stated that it would not hesitate to decertify the class if it became unmanageable. J.A. 1260-61. Thus, in the unlikely event that the case becomes a "procedural morass," as the dissent predicts, *post* at 56, we are confident that the district court will fulfill its responsibility to decertify the class.

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[19] While the dissent bemoans the need for 1,400 separate individual full trials on the non-certified claims, its approach would, in fact, *add* claims -- all of the claims against TPCM -- to what it describes as a "minefield for legal error." *Post* at 82. Denying class certification against TPCM would require Plaintiffs to prove the same elements of the certified cause of action against

VI.

In conclusion, we note that circuit precedent provided clear guidance in resolving the issues presented in this case. On one hand, Plaintiffs' class action against TPCM bears many similarities to the class action we approved in *Central Wesleyan*, and promises many of the advantages: the plaintiffs advance a single theory of liability, requiring no individualized inquiry; class certification seems likely to conserve judicial resources and conserve litigation

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TPCM in 1,400 individual trials, with the possibility of contradictory findings and one-way issue preclusion. In contrast, by holding that the district court did not abuse its discretion in conditionally certifying the one cause of action against TPCM, we have faithfully adhered to the text and purpose of Rule 23 and chosen a course that will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *See* Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment, subdivision (b)(3)). In doing so, we believe we have removed from the dissent's "minefield" those mines that could properly be removed.

costs by reducing the need to re-litigate liability issues in multiple trials; in the absence of class certification it appears that many of Plaintiffs' claims against TPCM would not be brought; and class certification protects *the defendant*, TPCM, from inconsistent adjudications and one-way issue preclusion. Moreover, as in *Central Wesleyan*, the district court carefully assessed all of Rule 23's requirements for a class action and issued detailed factual findings explaining its decision in conditionally certifying the class. Indeed, to the extent there are significant differences between the class action certified against TPCM and the class action certification approved in *Central Wesleyan* -- such as the need in *Central Wesleyan* to determine comparative fault, and the application of the laws of different jurisdictions -- these differences weigh even more heavily in favor of class certification here. In sum, *Central Wesleyan* virtually compels the conclusion that the district court did not abuse its discretion in conditionally certifying Plaintiffs' class against TPCM.

On the other hand, Plaintiffs' proposed class actions against the Agents have many parallels to the class action we rejected in *Broussard*: the claims against the Agents require individualized proof of reliance and individualized proof of a specific undertaking to advise. The Agents' affirmative defenses would also require further individualized inquiry. Thus, *Broussard* would seem to require the conclusion that common issues do not predominate, and that class certification is not appropriate. Indeed, the district court recognized

Broussard's force and therefore attempted mightily to distinguish the case. The court could do so, however, only by misconstruing or ignoring controlling legal principles. When a court misapprehends or fails to apply the law with respect to underlying issues, it abuses its discretion. Accordingly, we hold that the district court abused its discretion in granting conditional class certification against the Agents.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in that part of the judgment holding that the district court abused its discretion in certifying individual "subclasses" against the Agent defendants. I dissent from the remainder. I would hold that the district court abused its discretion in certifying a single class for claims against TPCM because the representative parties have not satisfied the requirements of Federal Rules of Civil Procedure 23(a)(3), 23(a)(4), and 23(b)(3).

The majority opinion in this case is able to approve a partial classaction certification only by failing to account for the full range of the plaintiffs' claims and the extent to which most of their claims must concededly be adjudicated on an individual basis, ignoring the erosive effect that the individual adjudications of these additional claims has on the predominance requirement of Rule 23(b)(3) that common issues predominate over the individualized questions raised in the action taken *as a whole*. For example, the majority never addresses the practical and legal difficulties that will arise from the certification of a class action against TPCM with respect to only one or two issues while leaving for individual adjudication in 1,400 separate individual trials the issues of damages and, in some cases, causation, as well as:

1) all claims under the South Carolina Unfair Trade Practices Act;

2) all claims alleging civil conspiracy;

3) all claims involving violations of RICO;

4) all issues that qualify each plaintiff for a claim under the applicable Plan; and

5) all claims against the agents who sold the Plan.

The need for these individualized separate trials is conceded.

Despite the overwhelming predominance of these individualized issues and claims over the common issue that the majority now certifies for class treatment, the majority has adopted an inventive approach to Rule 23 that allows certification of a class where the predominance requirement of Rule 23(b)(3) is admittedly unmet in the context of the case as a whole. According to the majority, to require the certified issue in this case to predominate over the individualized issues in the action as a whole ignores Rule 23(c)(4)(A), which it appears to view as a fourth avenue for class certification, on equal footing with Rules 23(b)(1), 23(b)(2), and 23(b)(3). In doing so, the majority glorifies Rule 23(c)(4)(A) -- a housekeeping rule that authorizes a court to certify for class treatment "particular issues" in a case that otherwise satisfies Rule 23(a) and 23(b) -- with the effect of materially rewriting Rule 23 such that Rule 23(b)(3)'s requirements no longer need be applied to "an action," *see* Fed. R. Civ. P. 23(b), but rather to any single issue, no matter how small.

Not only does the majority's approach expand Rule 23 beyond its intended reach, but it also creates a direct conflict with the Fifth Circuit which has held:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) in that (c)(4) is a house keeping rule that allows courts to sever the common issues for a class trial.

Castano v. American Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996); *see also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998).

In addition, the majority opinion attempts to shoehorn this case, even with its limited focus on a single issue, into the parameters of our distinguishable holding in *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993), in which we affirmed the conditional certification of a class of asbestos litigants. In doing this, the majority fails to consider the broad complexities raised by the unaddressed issues in this litigation and fails to apply the later and more specifically applicable controlling ruling of the Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997).

Finally, the majority fails meaningfully to address overt conflicts of interest existing among members of the conditionally certified class. For example, it does not attempt to explain how the conditionally certified class may include, on the one hand, employers seeking *rescission* of the insurance contract and the return of premiums paid, and, on the other hand, their employees seeking *enforcement* of the same insurance contract to obtain benefits under it. The majority also discounts, on scant deposition testimony, the potentiality that aggrieved employee-class members who were damaged by nonpayment or delayed payment of claims may implead as defendants their employers, who are also class members and who made the decision to purchase the woefully inadequate plan. Even aside from the antagonistic posture of the employer and employee class members, the injured employees' claims themselves will have to be aggregated into antagonistic subclasses, based on when their claims were mismanaged and by whom, with entitlement to relief premised on different theories. By lumping all of these employees into one class and apparently casting aside as informally "disavowed" a group of employees' best theory of recovery, the majority deindividualizes inherently individual claims and lops off substantial limbs from the various class members' claims in order to bless the conglomeration of a similar, albeit now disabled, class of litigants.

Had these problems been addressed by the majority opinion and the distinguishable aspects of *Central Wesleyan*, as well as the controlling analysis of *Amchem*, been explored, it would have become apparent that plaintiffs cannot satisfy, under any applicable precedent, the requirements of Federal Rule of Civil Procedure 23 (1) that their claims *be typical* of the claims of the class so that they can act *as representative parties,* able fairly and adequately to protect the interests of the class, as required by Rule 23(a)(3) and (4); (2) that common questions of law and fact *predominate* over questions affecting only individual class members, as required by Rule 23(b)(3); and (3) that the class action be *superior* to other available methods for the fair and efficient adjudication of the numerous claims and controversies, as required by 23(b)(3).

As a result of the majority's limited focus on the facts related to a single issue in this case, it has left a difficult and complex procedural structure created by the need to try numerous individual claims for each class member that will result in an unnecessary, and ultimately unhelpful, procedural nightmare. And on a broad judgment level, one has to question the utility of enduring this procedural morass for the purpose of answering the single question certified for class treatment: whether TPCM's mismanagement was *a* cause of the Plan's failure. Answering this question resolves no class member's claim and only invites the difficult questions of how to proceed once the question is answered. Little, if any, time or effort can be saved by answering this question in the abstract because full individual trials on liability will still have to be conducted for each individual class member.

I would reverse the certification of the class against TPCM in this case for the reasons that follow.

I

Because the majority holds that the district court's conditional certification of a single issue against TPCM constituted a proper application of Rule 23(c)(4), *ante* at 14-15, it is necessary to address at the outset the fundamental issue of why the predominance requirement of Rule 23(b)(3) cannot be bypassed by reliance on Rule 23(c)(4). In short, I believe that the majority, in adopting an expansive interpretation of Rule 23(c)(4), has enlarged the reach of Rule 23 in a manner not contemplated by the Rule's drafters and not consistent with the Supreme Court's approach calling for an "undiluted" application of Rule 23(b)(3)'s requirements in every case. *Amchem,* 521 U.S. at 620; *see id.* (noting that the Rule, as written, "sets the requirements [courts] are bound to enforce" and counseling against "judicial inventiveness" in application of the Rule). Thus, I would conclude that the history of the Rule and its text, read in light of the Supreme Court's holding in *Amchem,* require that even in cases involving the certification of issue-only classes, the common issues must predominate over questions affecting only individual members of the class in the context of the action as a whole. The majority's conclusion to the contrary seems to invite an unhesitating approach to granting class certification where other procedural devices would suffice, and in doing so, it opens a conflict with the Fifth Circuit. Thus, only after I elaborate the basis of my conclusion that a predominance analysis is mandated in every Rule 23(b)(3) class action do I then proceed with the required analysis by looking at the various issues and claims presented in this case.

Of the Rule 23 amendments adopted in 1966, the addition of Rule 23(b)(3) was "the most adventuresome innovation." *Amchem,* 521 U.S. at 614 (internal quotation marks and citation omitted). Because Rule 23(b)(3) was an innovative device and indeed involved some speculation about its impact, the Rule was careful to impose two specific and important requirements that must be found as conditions to certification of any class under the Rule. The "predominance" requirement requires the district court to evaluate the "action" to determine whether "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and the "superiority" requirement requires the court to analyze whether the proposed class action would be "superior to other available methods for the fair and efficient adjudication of the controversy" raised by the "action." Fed. R. Civ. P. 23(b)(3). If an action does not satisfy those two "class-qualifying criteria" in addition to the requirements of Rule 23(a), *Amchem,* 521 U.S. at 621, there is no basis for the court to certify a proposed class, even on a conditional basis. The predominance and superiority requirements are thus organic to every 23(b)(3) action. In *Amchem,* where the plaintiffs sought to bypass the predominance requirement in certifying a class for settlement, the Supreme Court could not have made that proposition any clearer:

> In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is main tainable under Rule 23(b)(1), (2), or (3).
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> * * *
>
> To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy."

Id. at 614-15. Indeed, the Court emphasized that Rule 23(b)(3)'s requirements are "class-qualifying criteria" and that "federal courts . . . lack authority to substitute for Rule 23's certification criteria" any other standard than the one adopted in the rule itself. *Id.* at 621-22.

Even though every class action must pass through the gates of Rule 23(b)(3), a court is, of course, entitled to take into account the manageability tools supplied by Rule 23(c)(4) in determining whether the predominance and superiority requirements of Rule 23(b)(3) are satisfied with regard to the action as a whole. Thus, just as a court may consider the availability of subclasses in determining whether an action satisfies Rules 23(a) and 23(b)(3), *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856, 144 L. Ed. 2d 715, 119 S. Ct. 2295 (1999)(noting that, at the class certification stage, the availability of subclasses to eliminate conflicting interests could factor into whether the requirement of Rule 23(a)(4) is satisfied), so may it consider the availability of issue-only classes in making the same determinations. In either case, for such subclasses or issue-only classes to be useful management tools in a particular case, they, too, must individually satisfy the requirements of Rule 23(a) and 23(b)(3). *See* Fed. R. Civ. P. 23(c)(4) (providing that, if a court utilizes issue-only classes or subclasses, "the provisions of this rule shall then be construed and applied accordingly"). In the case before us, however, the threshold dispute I have with the majority is not whether the single-issue class that has been certified here satisfies Rule 23(b)(3),[1] but rather whether an issue-only class action may be maintained under Rule

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[1] For reasons that I explain *infra*, I would hold that the class certified does not even satisfy the requirements of Rule 23(a) and 23(b)(3).

23(c)(4) when the common issue does not predominate over the other issues in the litigation that affect only individual members.

I conclude that when the text of Rule 23(b)(3) provides that "questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members" in "an action," "action" means the *action as a whole*. And I do not believe that the possibility of bringing or maintaining an action "with respect to particular issues" was ever meant to expand Rule 23(b)(3) to allow class certification when the individual issues in the class members' case against a defendant tower over the comparably insignificant common issue or issues. The majority disagrees with my reading, which it disparages as "rigidly sequential," *ante* at 34, instead adhering to a reading of Rule 23(c)(4) that allows a district court to certify any common issue in the litigation, no matter how small. In my view, the majority's interpretation of Rule 23(c)(4) invites a diluted application of Rule 23(b)(3) in the context of issue-only classes, which I respectfully submit departs from the principle elaborated in *Amchem*.

The core question addressed by the Supreme Court in *Amchem* was the interplay between Rule 23(b)(3) and 23(e), the provisions upon which the parties sought certification of a settlement-only class and, ultimately, approval of the negotiated settlement. The settling parties viewed the predominance requirement as a requirement applicable only to an action that was destined for *trial*, and therefore they argued that cohesion of the action and fairness for settlement was better determined by a hearing under Rule 23(e) when approving settlement. Because the Supreme Court in *Amchem* analyzed the relationship between the predominance requirement of Rule 23(b)(3) and the settlement authority of Rule 23(e), its analysis is apposite to the analysis of whether the predominance requirement of Rule 23(b)(3) can be subverted by Rule 23(c)(4)(A).

The district court in *Amchem* certified the settlement-only class over objectors' strenuous objections that the Rule 23(b)(3) class did not meet the requirements of Rule 23(a) and (b)(3). The Third Circuit vacated the class certification, holding that the settlement-only class satisfied neither Rule 23(a) nor 23(b)(3) and that the cases should proceed either through consolidation under Rule 42(a) or as smaller class actions under Rule 23. 521 U.S. at 611. Affirming the Third Circuit, the Supreme Court "emphasized" that the requirements of Rule 23(a) and (b)(3) are "safeguards," not "impractical impediments" that can be disregarded by a court that perceives a measure of fairness in overlooking these standards in a particular case. *Id.* at 621. While holding that settlement was "relevant" to class certification and acknowledging that the manageability of a trial was not relevant to a class action where no trial was contemplated, the court noted that the other specifications of the Rule, including the predominance requirement, "demanded undiluted, even heightened attention." *Id.* at 620. Requiring a settlement-only class to satisfy Rule 23(b)(3)'s requirements, the Court held, "serves to inhibit appraisals of the chancellor's foot kind -- class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Id.* Importantly, the Court concluded that "it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representation action in the first place." *Id.* at 623. "If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3)," the Court continued, "that vital prescription would be stripped of any meaning in the settlement context." *Id.*

Just as it is not the mission of Rule 23(e) to supply the cohesion that legitimizes a settlement-only class action, neither is it the mission of Rule 23(c)(4)(A) to supply the cohesion to legitimize an issue-only class action. In both situations, the cohesion essential to legitimize a 23(b)(3) class action can be shown only when the action as a whole satisfies the predominance requirement of Rule 23(b)(3). The principle of *Amchem* is that every Rule 23(b)(3) class action must satisfy all of the provisions of Rule 23(a) and (b)(3), and the other provisions of the Rule, including Rule 23(e), cannot be used to dilute the requirement that each proposed class must satisfy the predominance requirement to merit certification. In my view, the majority's reading of Rule

23(c)(4) allows for a diluted application of Rule 23(b)(3) by removing from the predominance calculus most of the individualized issues in the case.

Under the majority's analysis, which looks at the common issue in the case through a pinhole and ignores all other issues, Rule 23(b)(3)'s vital prescription is stripped of any meaning in an even more dramatic way than it was in *Amchem*. The majority in this case boldly holds that individualized claims and issues in this action are not a factor in analyzing whether common issues predominate in the *certified* claim against TPCM, leaving one to wonder exactly *what the isolated common issue must predominate over*. For if Rule 23(c)(4)(A) allows a court to omit from its predominance analysis any claims or issues affecting only individual members, it would seem that the predominance of the selected issue is a foregone conclusion since the common question of law or fact would always predominate over the individual issues that are not a factor. And in the rare instance where the majority might find a common issue not to predominate in a given case, it could simply narrow the pinhole until, in its view, the selected issue predominates over the other issues it chooses to see. Indeed, nothing in the majority's opinion supplies any lower limit on just how narrow a common issue may be before its analysis must yield to common sense. By adopting a view of Rule 23(c)(4)(A) that strips Rule 23(b)(3) of its meaning, necessitating the aid of additional principles found nowhere in the Rule itself, the majority has "substituted for Rule 23's certification criteria a standard never adopted," a substitution that "federal courts . . . lack authority" to make. *Amchem*, 521 U.S. at 622.

In an effort to enlist legal authority to interpret Rule 23 to authorize a class action on a single issue, the majority, in Part V, misconstrues how I have interpreted Rule 23 and fails to appreciate the consequences of reading the Rule in a manner that lets Rule 23(c)(4) serve as a gate house for determining whether a class action should be certified. Even as an action may include different "causes of action" or different theories of recovery, all causes of action or claims must be related to form the action. *See* Fed. R. Civ. P. 18-21, 42. And Rule 23 provides that, to qualify "an action" as a class action, the prerequisites of both subdivision (a) and subdivision (b) be satisfied. *See* Fed. R. Civ. P. 23(b). Subdivision (c) then addresses the management of the class action authorizing the certification of either issues or subclasses. But a class certification with respect to an issue cannot, without bypassing Rule 23(b), be undertaken unless the issue is so important to disposition of "the action" that it "predominates over any questions affecting only individual members." Rule 23(b)(3). None of the cases cited by the majority advocate such a bypassing that the majority now advances as an entirely novel proposition.

The majority criticizes my demand that a full predominance analysis be conducted, as required by Rule 23 and *Amchem*, both insisting that it can rely on a single issue to certify the class -- notwithstanding a conclusion that the predominance test would *not* be satisfied in the context of the action as a whole -- and stating that I have "ignored the plain language of [Rule 23(c)(4)]," *ante* at 34, and that my analysis "renders a subsection of the rule superfluous," *ante* at 35.

I disagree. This very case illustrates the importance of my conceptual disagreement with the majority and the inviability of the majority's position. In this case, the class members have asserted *seven* causes of action against TPCM: an unfair trade practices claim, a negligent undertaking claim, a fraud claim, a negligent misrepresentation claim, a breach of contract claim, a civil conspiracy claim, and a RICO claim. The majority, *without identifying to which of these seven causes of action the certified issue belongs*, has certified for class treatment the vague question whether TPCM was "a cause" of the failure of the Plan. Naming this certified question a "cause of action," but not tying it to any specific claim in the complaint, the majority makes the analysis of what this common question must predominate over particularly abstruse. The majority's analysis seemingly identifies a common causation issue and then jumps immediately to Rule 23(c)(4)(A) to insulate the newly certified issue-only class from the scrutiny of the predominance requirement in the context of the case as a whole, even as the plaintiffs urged consideration of the entire action and certification of the action as a whole. *See* Pls.' Mot. for Class Certification at 4 (seeking certification of a single class for all seven causes of action against TPCM and certain other defendants).

In failing to examine the various other issues presented in the entire action to determine whether the required "cohesiveness" is present to "legitimize[ ] representative action in the first place" -- as mandated by 23(b)(3), *see Amchem,* 521 U.S. at 623 -- and by jumping to 23(c)(4), the majority not only bypasses one of the most essential and most important checks imposed by Rule 23 on certifying Rule 23(b)(3) classes, it also opens a conflict among the circuits on this issue. The Fifth Circuit has applied the Rule with the dogged requirement of satisfying predominance before considering other aspects of the Rule in a 23(b)(3) class. *See Smith v. Texaco, Inc.,* 263 F.3d 394, 409 (5th Cir. 2001) (later withdrawn pursuant to settlement by the parties, *see* 281 F.3d 477 (5th Cir. 2002)); *Allison,* 151 F.3d at 421-22; *Castano v. American Tobacco Co.,* 84 F.3d 734, 745 n.21 (5th Cir. 1996). In *Smith,* the court explained its position on the proper relationship between the predominance requirement and Rule 23(c)(4):

> The predominance inquiry involves a comparison of the issues common among the class members and the issues individual to them. This analysis remains unchanged whether a class is certified under one or more sections of rule 23(b). The inquiry's constancy serves as an important limitation on the use of bifurcation by preventing a district court from manufacturing predominance through the "nimble use" of Rule 23(c)(4). *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).
>
> Therefore, the cause of action, as a whole, must satisfy rule 23(b)(3)'s predominance requirement. *Id.* Once that requirement is met, rule 23(c)(4) is available to sever the common issues for a class trial. To read the rule not as a housekeeping rule, but instead as allowing a court to pare issues repeatedly until predomination is achieved, would obliterate rule 23(b)(3)'s predominance requirement, resulting in automatic certification in every case in which any common issue exists, a result drafters of the rule could not have intended.

263 F.3d at 409; *see also Allison*, 151 F.3d at 421-22. *Cf. Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th

Cir. 1996) (reversing a district court's effort to rely on 23(c)(4) and bypass 23(b)(3) but acknowledging that in "appropriate cases" the predominance requirement could be overlooked). We can identify no precedent from the Supreme Court or from our fellow Circuits to support the majority's holding.

The majority's breathtaking assertion that its reading of Rule 23(c)(4) does not in any way contravene the Fifth Circuit's cases is simply not true. The Fifth Circuit, by its very language, only consults the "housekeeping" provisions of Rule 23(c)(4) "once [the predominance] requirement is met." *Smith,* 263 F.3d at 409. This is exactly the "rigidly sequential approach" that the majority criticizes in its opinion, *ante* at 34, making its claim to consistency with the Fifth Circuit facetious, at best. The majority's wordsmithery with respect to the term "cause of action" does not disguise a plain conflict between the Fifth Circuit's holding and its holding. To be sure, the majority identifies some district court opinions, commentaries, and a student note that, citing one another, argue in favor of the majority's interpretation. But I respectfully disagree with the cited authorities, and in doing so, I adhere to the view of the only other circuit court to address the issue.

I would hold therefore that under the proper analysis, the district court must determine that the *action* as whole satisfies the predominance and superiority requirements imposed by 23(b)(3), and actions satisfying these requirements may be managed through orders authorized by 23(c). Thus, under Rule 23(c)(4), a court could create subclasses or even bifurcate claims by issues, grouping them for class action treatment. But in this complicated case, the predominance and superiority requirements cannot be satisfied even with the aid of the manageability tools supplied by Rule 23(c), as I now proceed to demonstrate in some detail.

II

The plaintiffs in this case are purchasers and beneficiaries of a multi-employer healthcare plan (the "Plan") sponsored and marketed in South Carolina by the Fidelity Group, Inc. On the Plan's demise, they commenced this class action under Federal Rule of Civil Procedure 23(b)(3) against the Fidelity Group and related companies and individuals, against 43 agents who marketed and sold the Plan, and against the Plan's first claims administrator, alleging breach of contract, fraud, mismanagement, and related claims.

The district court, by order dated September 28, 2001, certified 24 parallel classes -- one against each of 23 agents and one against the claims administrator -- but left for individual trials numerous claims, numerous issues within class-action claims, and all damage issues, concluding that approximately 1,400 mini-trials will be required.

We granted the defendants' motion to review this order under Federal Rule of Civil Procedure 23(f).

Although discovery has not been completed and the facts have not yet been fully developed, it appears that the Fidelity Group intended to create and market a multi-employer healthcare plan that would be available to small businesses and individuals and that would be subject to regulation by the provisions of ERISA. To do this, it created both the National Association of Business Owners and Professionals ("NABOP") to act on behalf of potential business customers and the International Workers Guild, Inc., a union to act on behalf of the business customers' employees and other individuals who might elect coverage under the Plan. NABOP and the International Workers Guild thereafter "negotiated" the Plan to provide healthcare and dental benefits to Plan participants and beneficiaries. The Fidelity Group, through NABOP, then entered into a contract with Third Party Claims Management, Inc. ("TPCM")[2] to administer the Plan and process claims. Under this contract, effective April 1, 1995, TPCM became responsible for processing incoming claims, determining each claimant's eligibility for coverage, computing benefits payable, and paying claims out of a bank account maintained by the Fidelity Group and NABOP.

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[2] At the time of contract, TPCM's name was Millennium HealthCare, Inc., and later TPCM was succeeded by Healthplan Services, Inc. For convenience, I refer to any or all of these entities collectively as "TPCM."

Plaintiffs allege that over the next three years, the Plan's administration became deficient, causing a backlog in the processing and paying of claims, ultimately contributing to the Plan's becoming underfunded and to its demise. There is evidence in the record to support allegations that TPCM did a poor job of paying claims, sometimes losing claims and other times adjusting or "adjudicating" claims that should not have been adjudicated. TPCM admits that it did not have a sufficient number of trained claims examiners to stay current with claims being filed, and, as a result, a backlog in claims processing developed that grew to six to eight months. Plan members began to complain widely of the delays in the processing of their claims.

During the same period that TPCM was administering the Plan in this case, it was also experiencing a claims backlog for at least ten other clients. There is evidence that TPCM's problems were caused in part by the fact that, during the approximately 20 months it was administering claims under the Plan, TPCM moved its claims administration operations twice, each time requiring new notifications to healthcare providers of the need to forward claims to a new address. After TPCM failed to reduce the backlog and fulfill its continuing assurances to the

Fidelity Group and NABOP that it would correct the deficiencies, NABOP terminated the contract with TPCM for cause, effective May 1, 1997, and the Fidelity Group moved claims administration "in-house," to be handled by Fidelity Claims Management, Inc.

Because there was a serious backlog and Fidelity Claims Management, lacking both experience and expertise, apparently was not prepared to step in as administrator, Plan members continued to suffer delayed payment or nonpayment of their claims. After more than a year of additional frustration by Plan members, the Secretary of Labor commenced an action in 1998 against the Fidelity Group and related companies and individuals in the Eastern District of New York to take control of the Plan's assets and to shut down the Plan's operations. The district court in New York issued a stay, enjoining the prosecution of suits against the Fidelity Group, the Plan, and related corporations and individuals, and it appointed an independent fiduciary to manage the assets. On the fiduciary's request that the Plan be terminated, the New York district court ordered the Plan terminated, effective January 31, 1999.

The plaintiffs commenced this action on September 11, 1998, and the district court followed the New York court and likewise stayed claims against the

Fidelity defendants.[3] But, by an order dated December 27, 1999, the district court lifted the stay as to "all non Fidelity Defendants," allowing prosecution of the claims against TPCM for claims mismanagement and against the selling agents for misrepresenting the Plan. The selling agents are 43 individuals and companies that sold the Plan on behalf of the Fidelity Group to businesses and individuals during the period from August 1995, when the Plan commenced, to July 1997, when the agents were ordered by the South Carolina Department of Insurance to cease marketing the Plan.

In their complaint against TPCM and the 43 selling agents, the plaintiffs alleged (1) violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.*; (2) negligence in undertaking to administer, market, and represent the Plan; (3) fraud in connection with representations made about the formation of the Plan, its benefits, its administration, and its value; (4) negligent misrepresentation, which plaintiffs alleged induced them to purchase and continue to pay for the Plan; (5) breach of contract; (6) civil conspiracy to form, market, and sell a "substantially worthless health care and dental" plan; and (7) violations of RICO, 18 U.S.C. § 1961 *et seq*. The gravamen of plaintiffs' claims against TPCM is that TPCM, under circumstances that vary from plaintiff to plaintiff, breached duties to pay plaintiffs' claims timely and to provide accurate information concerning the status of pending claims. The plaintiffs allege that these breaches not only caused them direct injury but also contributed to the ultimate failure of the Plan, causing them injury on this indirect basis. The gravamen of plaintiffs' claims against the agents is (1) that the agents sold the plaintiffs worthless insurance that did not comply with South Carolina statutory requirements, (2) that the agents were not licensed to sell the Plan, and (3) that they fraudulently or negligently misrepresented the Plan and provided negligent advice regarding the Plan.

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[3] The Fidelity defendants include the Fidelity Group, NABOP, the union that it formed, the Plan, Fidelity Claims Management, and involved executives and employees.

For relief, the employer-plaintiffs that provided the Plan benefits to their employees seek return of the premiums paid for "worthless insurance" as well as consequential damages. The employee-plaintiffs enrolled in the Plan seek payment of the benefits to which they were entitled and consequential damages, including damages for mental anguish, loss of enjoyment of life, injury to their reputations and credit ratings, and costs of rectifying delayed payments. All plaintiffs seek punitive damages.

The plaintiffs sought to represent a class of 1,400 persons, consisting of all persons who purchased coverage under the Plan on or after August 15, 1995, who have claims against TPCM and against the agents as a group, and all employees and beneficiaries who had claims during the three-year period it was operating. They also sought to represent agent-specific subclasses with respect to particular negligence and fraud claims against 23 particular agents. In explanation, they alleged:

> Certain claims against the Defendant Agents, including civil conspiracy and RICO claims, can be treated on a class-wide basis. Other claims against the defendant agents may be more agent-specific and may exist only between those class members and the particular Defendant Agent who marketed, sold, or otherwise provided the coverage under the fund to plaintiffs.

As to the other 20 agents -- for whom there were no corresponding named plaintiffs -- no subclasses were requested.

Troubled somewhat by the problems of granting class treatment as to all asserted claims, the district court granted in part and denied in part plaintiffs' motion for class certification. In doing so, the court left a complex division between individualized claims and claims subject to class-action treatment. Assessing the motion for class certification against the requirements of Rule 23, the court first concluded that the number of class members is "approximately 1,400," which it concluded satisfied the numerosity requirement of Rule 23(a)(1). But on the 23 proposed agent-specific "subclasses," the court acknowledged that the numerosity issue was a close question. As to one agent, the court noticed that only 8 employees were involved, and 2 of them already had filed individual actions against the agent. Another agent had enrolled only 13 to 14 employees. The court acknowledged that "while these numbers do not definitely constitute a finding of numerosity, Plaintiffs note that the agent Defendants failed to take into account the significant number of dependents that were also covered by the Plan." It found that including dependents, there were 11 members of the class for the one agent and 21 for the other. The court did not examine numerosity with respect to the other 21 agent classes but it observed that they contained more members. It concluded, "while these numbers may fall on the borderline of numerosity, the court finds that numerosity is met as to these agents."

The court next concluded that the proposed classes satisfied the commonality and typicality requirements of Rule 23(a)(2) and (a)(3), noting that the common issues included (1) whether TPCM mismanaged plaintiffs' claims, (2) whether TPCM's alleged negligence proximately caused the failure of the Plan, and (3) whether the agents misrepresented the Plan to the plaintiffs. The court acknowledged, however, that all claims for "mental anguish or emotional distress" and damage to credit ratings and reputation would have to be decided individually. The court also acknowledged the potential need for individualized mini-trials on proximate causation specifically relating to the reason for nonpayment of a given claim. This was especially true, the court noted, as to "non-adjudicated unpaid claims for medical bills," i.e., those which had never been analyzed by a claims adjuster.

In evaluating the adequacy-of-representation requirement set forth in Rule 23(a)(4), the court rejected TPCM's contention that plaintiffs could not represent the class adequately because of conflicts of interest among class members. TPCM had argued that there was a conflict between the employer-plaintiffs who purchased insurance coverage for their employees and the employee-plaintiffs who might have a claim against their employers and who would in any event be seeking different relief. The court ruled that the employee-plaintiffs' claims against their employers were not "viable," and, in any event, the employee or employer class members "could opt out of the class."

In considering the requirements of Rule 23(b)(3), the court first concluded that common issues predominated over issues affecting only some of the class members. The court reasoned that, because most of the plaintiffs' unpaid claims had already been "adjudicated," individualized inquiries relating to the proximate cause of plaintiffs' unpaid claims would not be necessary. The court reiterated that causation issues relating to unadjudicated claims could be resolved in the individualized mini-trials necessary also to resolve damages.

As to the 23 agent-specific "subclasses," the court also acknowledged that oral representations and individual reliance tended to suggest individualized treatment of the claims against the agents. Nonetheless, the court concluded that those defenses could be generalized by presumptions and therefore treated on a class-wide basis:

> [A] common sense approach presuming reliance exists may be acceptable in this circumstance. Therefore, in certain cases, "reliance may be presumed for fraud-based common law claims when the alleged omissions and misrepresentations are uniform and material and the class members acted in a manner consistent with reliance."
>
> * * *
>
> Even if the court has erred in its analysis and reliance does threaten the predominance of common issues in this case, that threat can be eliminated by bifurcating the issues of reliance where individual inquiries would be proper.

On the superiority requirement of Rule 23(b)(3), the court acknowledged that "manageability of this class action is of particular concern to the court," pointing particularly to the necessity of individual "mini-trials." However, the court then concluded that

> The record presently before the court suggests that bifurcation of individualized damages issues and possibly proximate cause issues regarding non-adjudicated claims would not present an unmanageable scenario for the court.

Addressing separately the civil conspiracy and RICO counts, the court concluded that individualized defenses predominated, and therefore it excluded those claims from class-action treatment. It said:

> The court notes a significant problem regarding individualized issues inherent where numerous defendants (in fact a class of defendants) are accused of being part of a vertical conspiracy such as the one alleged in this case. These issues arise primarily due to individualized defenses which may be available to the Agent Defendants.

* * *

> Therefore, the court concludes that individual issues regarding Plaintiffs' conspiracy claims predominate rendering class treatment of all Plaintiffs' conspiracy claims against all Agent Defendants unadvisable.

On the South Carolina Unfair Trade Practices Act count, the court again required individual trials because the statute itself mandates such treatment. *See* S.C. Code Ann. § 39-5-140(a).

After making this overall division between claims and issues for class-action treatment on the one hand and claims and issues for individual trials on the other, the court entered the following order certifying this case as a class action:

> It is, therefore, ordered, for the foregoing reasons that Plaintiffs' Motion for Class Certification is conditionally granted as modified by this Order. Specifically, the proposed class of all Plaintiffs for claims against TPCM is conditionally certified (excluding claims under the South Carolina Unfair Trade Practices Act). However, class-wide treatment of Plaintiffs' conspiracy claims against all Agent Defendants is denied. Instead, the court conditionally certifies Plaintiffs' proposed subclasses currently with

representatives based on the Agent Defendants as individual classes for all of the Plaintiffs' claims (excluding claims under the South Carolina Unfair Trade Practices Act).

In sum, the court certified 24 distinct and parallel class actions, having rejected any overarching class action against the agents, to try a limited range of claims and issues. The court ruled that individual trials would have to be conducted on:

1) all claims under the South Carolina Unfair Trade Practices Act;

2) all claims alleging civil conspiracy;

3) all claims involving violations of RICO;

4) any reliance issues that could not, as a matter of law, be presumed;

5) all damage issues;

6) claims against the 20 agents with whom no named plaintiffs had dealings;

7) all issues regarding the fact and nature of injury specifically as to plaintiffs' claims of mental anguish and emotional distress, injury to credit rating, and injury to reputation; and

8) all questions relating to whether plaintiffs' claims were "adjudicated" and to the cause of delayed payment or nonpayment for those not adjudicated.

TPCM and the 23 agent-defendants against whom class actions were certified filed a motion under Federal Rule of Civil Procedure 23(f) for permission to appeal the district court's interlocutory order, and by order dated November 30, 2001, we granted that motion.

III

It is appropriate to set forth the established principles applicable to consideration of the issues. We have previously held that "district courts have 'wide discretion in deciding whether or not to certify a proposed class,'" *Central Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 728-29 (4th Cir. 1989)), but we have noted that this discretion must be exercised "'within the framework of Rule 23,'" *Lienhart v. Dryvit*

Sys., Inc., 255 F.3d 138, 146 (4th Cir. 2001) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996)). Where, as here, the plaintiffs have sought class certification pursuant to Federal Rule of Civil Procedure 23(b)(3), the plaintiffs bear the burden of proving that the "numerosity, commonality, typicality, representativeness, predominance, and superiority requirements of both Rule 23(a) and (b)(3) are met." *Id.* The placement of this burden upon the parties seeking class certification reflects the principle that a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979). Though the issue of manageability of a proposed class action is "peculiarly within [the] discretion" of the district court, *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977), we will nonetheless vacate the certification of a class when plaintiffs have not sufficiently shown the presence of *all* of the Rule 23(a) and (b)(3) requirements.

Every class action must satisfy the four criteria set forth in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). Numerosity requires that the class be so numerous that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The "final three requirements of Rule 23(a) 'tend to merge,' with commonality and typicality 'serving as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 158 n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)). In addition, a class action must satisfy the criteria of Rule 23(b)(1), (b)(2), or (b)(3).

Plaintiffs here have sought certification of a class under Rule 23(b)(3). Because Rule 23(b)(3) is designed for "situations in which 'class-action treatment is not as clearly called for,'" plaintiffs must go beyond satisfying the Rule 23(a) prerequisites and satisfy two additional requirements, "predominance" and "superiority." *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3) Advisory Committee Notes). To satisfy the predominance requirement, plaintiffs must show that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and to satisfy the superiority requirement, they must show that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The predominance requirement is "far more demanding" than Rule 23(a)'s commonality requirement and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. Our recent opinions, decided after *Amchem,* recognize this more demanding standard.

In *Broussard,* we vacated a judgment against a defendant franchisor and ruled that certification of the franchisee-plaintiff class was error in an action where the franchisees had asserted claims for breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation, among others. 155 F.3d at 352. Despite our recognition that the district court had exercised its "broad discretion" in deciding to certify the class, we nonetheless decertified the class because the franchisees had not shown that the commonality and typicality requirements of Rule 23(a) were met. *Id.* at 340-44. The franchisees were "a hodgepodge of factually as well as legally different plaintiffs": they signed different contracts with the defendant, relied upon different alleged oral misrepresentations, exhibited varying degrees of reliance upon such misrepresentations, and presented factually different bases for tolling relevant statutes of limitations. *Id.* at 343. Moreover, the plaintiffs in *Broussard* alleged damages that were "inherently individualized and thus not easily amenable to class treatment." *Id.* at 342. We acknowledged that although the need for mini-trials on damages is not necessarily fatal to class certification, plaintiffs' claims for lost profits were not a "natural candidate for classwide resolution" because the governing state law required an individual case-by-case analysis of such claims. *Id.* at 343.

Most recently, in *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 149 (4th Cir. 2001), we held that where "the functional equivalent of a full-blown trial on damages causation for each putative class member would be required to determine to which individuals [the defendant] is liable," the predominance requirement of Rule 23(b)(3) is not met. This was an application of the principle we elaborated in *Windham v. Am. Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), that predominance may be destroyed when individualized issues regarding damages would require a large number of separate mini-trials. *See id.* at 69 ("Where the issue of damages and impact does not lend itself to such a mechanical calculation, but requires separate mini-trials of an overwhelming large number of individual claims, courts have found that the staggering problems of logistics thus created make (the) damage aspect of the case predominate, and render the case unmanageable as a class action") (quotation marks and internal citations omitted).

It is against this background that we must consider the class-action certification.

IV

Presented with a seven-count complaint against TPCM and 43 agents, the majority has affirmed the conditional certification of a class of 1,400 insureds and their families against TPCM under Rule 23(c)(4) to answer only "whether TPCM mismanaged the Fund" and "whether TPCM's mismanagement was *a* proximate cause of the Plan's collapse." *Ante* at 15 (emphasis added).[4] In relying on Rule 23(c)(4) and not the complete analysis of Rule 23(b)(3), the majority fails to answer how these common questions predominate and how this fractured class action advances judicial efficiency. The certified questions do not resolve even a major portion of the issues that must be decided individually, including up to 1,400 mini-trials on damages and causation alongside 1,400 individual full trials on the civil conspiracy claims, RICO claims, and claims under the South Carolina Unfair Trade Practices Act. The majority also concludes that the requirements of Rule 23(a) have been satisfied despite substantial conflicts of interest that are evident based upon the minimal discovery already conducted.

In the majority's view, this case is a near carbon copy of *Central Wesleyan*, a nationwide class action against asbestos manufacturers in which we affirmed the conditional certification of a class. In my view, however, the class certified here, unlike the one certified in *Central Wesleyan*, is a hodgepodge of dissimilarly situated plaintiffs who dealt with the defendants at different times and under different circumstances and who have antagonistic interests. The class here is cobbled together to resolve very little before ultimately relegating the hard questions to individual trials. Although the majority's effort to fashion a certifiable class under our precedents appears, on the surface, to aid the aggrieved plaintiffs, I believe the majority deviates substantially from the requirements of Rule 23, in the end denying procedural fairness to all of the litigants. I begin by demonstrating the plaintiffs' most obvious failure -- their failure to show that the common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

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[4] The majority's evolving definition of the certified issue now also includes "whether the Fidelity Defendants"--who are not a party to the class that was certified--"also mismanaged the Fund, and whether the Fidelity Defendants' mismanagement was an intervening cause of the Plan's collapse sufficient to relieve TPCM of liability." *Ante* at 15.

The class as approved by the majority consists of employers, employees, and individuals who purchased or used healthcare benefits provided through a Plan sponsored and marketed by the Fidelity Group and related companies over a period of three years. During the course of those three years, claims under the Plan were administered by TPCM during 1996 and part of 1997 and were then administered in-house by Fidelity during the remainder of 1997 until the Plan's demise in January 1999. Having suffered delayed payment of claims or nonpayment allegedly due to claims mismanagement, with injuries ranging from damaged credit ratings to emotional distress, plaintiffs seek recovery from the administrators of the Plan, the Plan itself, and the 43 agents who sold the Plan. It is the diversity of the factual and legal bases underlying these claims that confounds the plaintiffs' bold effort to resolve them through the class action process. Indeed, the majority recognizes that the individualized inquiries that pervade plaintiffs' claims against the individual agents preclude certification of any classes against them. And both the majority and the district court recognized that plaintiffs' claims based on the South Carolina Unfair Trade Practices Act, RICO, and civil conspiracy must proceed individually. That leaves for potential class certification four of the seven claims against TPCM, which sound in negligence and contract. Yet the evidence that will need to be presented in the class action against TPCM will need to be repeated to some extent in the individual trials against TPCM. For example, the complaint alleges that TPCM, among other defendants, violated the South Carolina Unfair Trade Practices Act by not providing timely coverage and not explaining why payment was delayed. This claim, which must, by statute, be tried individually by each class member, will of course require proof that TPCM was responsible for making payments and did not make such payments to that individual plaintiff in a timely fashion, thereby causing that plaintiff injury. The substantial effort in consolidating the "common question" in this case thus will yield remarkably little in advancing the class members' individual claims toward a resolution.

The majority is persuaded that, despite all of the differences among the class members that require so many individual trials on the most difficult issues, the common question in the class members' claims of whether TPCM's alleged mismanagement of claims "contributed to" or was "a cause" of the Plan's failure "predominates over any questions affecting only individual members" because Rule 23(c)(4)(A) authorizes the certification of individual issues. But this does not fulfill the requirement that whole "action" be scrutinized to determine whether individual claims predominate.

Although I recognize that many -- but not all -- of the class members' claims require resolution of whether TPCM contributed to the collapse of the Plan, this is an underwhelming commonality in light of the substantial individualized inquiries necessary to determine liability, not to mention damages. If the court proceeds under the class structure as proposed and determines that TPCM's claims mismanagement was, in fact, a cause of the Plan's failure, the liability inquiry will only have just begun. The subsequent and more difficult questions, to be litigated individually by class members whose claims were handled either by TPCM or Fidelity between 1996 and 1999, would persist, namely, whether the failure of the Plan caused the class member's injury and the more complex question of comparative fault.

Although the class as certified presumes a unified group of plaintiffs proceeding on a single legal theory of indirect liability, the complaint for good reasons asserts differing theories of recovery requiring the presentation of different, even conflicting, evidence, which undermines predominance. Specifically, the complaint alleges two theories of liability against TPCM: (1) direct liability, as to those who, for example, suffered injury to credit ratings solely because of a delayed payment during the time TPCM managed claims, and (2) indirect liability, as to those whose claims went unpaid or were paid late by *Fidelity* as a result of TPCM's prior claims mismanagement. The majority, recognizing that its "single theory" analysis "appears somewhat at odds" with the complaint and inconveniences its analogy to *Central Wesleyan,* has apparently accepted an informal disavowal of the direct theory of liability in appellees' brief. But oral argument clarified that appellees do not disavow anything in their complaint in this regard. At oral argument, appellees' counsel argued: "There is not a single claim, and they can't point to one, where we suggest that Third Party Claims Management did anything with any specific claim wrong." But counsel did not disavow direct liability claims; he simply portrayed direct liability claims as something other than what they are.[5] Counsel's argument betrays the language of the complaint, which clearly asserts *direct claims* against TPCM:

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[5] Questioning by the court at oral argument revealed that plaintiffs' counsel was not *disavowing* anything in the complaint, but rather making the demonstrably false argument that the complaint *never alleged* any direct theory of liability against TPCM:

> Judge Motz: You have a *direct* argument when TPCM is still in there.
>
> Counsel: Your Honor, we're not making that argument at all.
>
> Judge Motz: Okay, so you're disavowing that argument.
>
> Counsel: We *never made* that argument.

By embracing a disavowal that even plaintiffs' counsel disclaimed he was making, the majority leaves the plaintiffs with only direct liability claims against TPCM out in the cold. As the majority points out, the South Carolina statute of limitations appears to have run on actions for breach of contract and fraud, *ante* at 21. That leaves these plaintiffs who cannot -- or prefer not to -- proceed on an indirect liability theory to file their own individual actions, and exposes them to arguments that their claims are now untimely. Although equitable tolling might arguably rescue these unwanted plaintiffs from having their claims dismissed, the need potentially to employ such an extraordinary measure only bespeaks the peculiarity of the majority's cutting these plaintiffs' claims out of the complaint to certify the surviving allegations. Perhaps recognizing the severity of holding that the plaintiffs do not assert direct claims, the majority now alternatively states that the plaintiffs "do not seek class certification for any direct claims against TPCM," but this conclusion, too, flies in the face of the complaint and the motion for class certification, both of which seek certification of all claims against TPCM. The direct claims quite clearly inconvenience the majority's analysis.

> Defendant [TPCM] breached their duty [by] . . . failing to timely pay claims submitted to them; . . . charging fees in excess of what was allowed by agreement; failing to inform plaintiffs and other members of the class of their lack of experience and mismanagement of claims processing; failing to provide plaintiffs and other members of the class with accurate information concerning the status of claims submitted; in other words failing to exercise due care in the processing of claims submitted . . .; in providing misleading, false and/or fraudulent information about why claims were not being paid. . . . As a direct result of Defendants' negligent conduct, the Plaintiffs have been injured in numerous ways.

These allegations assert *direct* claims against TPCM based on individual failures that encompass more than the alternative theory of indirect liability flowing from the Plan's failure.

Because counsel did not disavow the complaint, but simply mischaracterized it, I am unwilling to concede that these claims have been removed from the case. It would be a questionable decision for plaintiffs' counsel to abandon the theory of liability that best suits an identifiable segment of the certified class. For instance, a class member whose claim was simply delayed, but ultimately paid, in 1996, when TPCM was the sole administrator, would have *only* a direct claim against TPCM for mismanagement, as the damage to that plaintiff was in no way related to the collapse of the Plan.[6] Jamming these unfortunate class members' claims into the single-theory class certified here -- which purports to proceed *only* on the theory of *indirect* liability -- not only requires a representative party to shoulder the more attenuated theory of recovery for some of her fellow class members but also actually *precludes* recovery for those who were in the circumstance where the collapse of the Plan did not cause injury. And even as to class members whose claims were ultimately unpaid, persons who might have a *direct* claim against TPCM find themselves sacrificed by counsel and caught in a class that requires them to show not only that TPCM mismanaged claims but also that the mismanagement led to the failure of the Plan and that the failure of the Plan caused their injuries. This theory may suit some class members, particularly those whose claims went unpaid by Fidelity after the termination of TPCM's contract, but it certainly is not fair to all class members. The majority opinion now precludes *any* recovery by any class member on a direct theory of liability against TPCM, regardless of the merits of their case. *Ante* at 18, 22 ("Class claims against TPCM . . . rest on a single theory: that TPCM's mismanagement of claims contributed to the ultimate collapse of the Plan and so caused Plaintiffs' damage. . . . [Although] somewhat at odds with the Plaintiffs' original complaint . . . Plaintiffs have made abundantly clear on appeal . . . they do not seek class certification for any direct claims against TPCM").

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[6] Indeed, counsel's reluctance to pursue both direct and indirect claims suggests their inability to represent absent class members whose *only* claims are *direct* claims.

By accepting the plaintiffs' mischaracterization of the complaint -- which the majority treats as a disavowal of the direct theory of liability -- the majority also tacitly recognizes the conflict that inheres when a single class proceeding on a single theory purports to represent plaintiffs with dissimilar theories of recovery. This court's response to a complex class action complaint alleging differing theories of recovery should not be to prune allegations and entire theories of recovery until a class remotely certifiable emerges. *Cf. Allison,* 151 F.3d at 422 n.17 ("We should not condone a certification-at-all-costs approach to this case for the simple purpose of forcing a settlement"). Rather, we should take the complaint as written, recognizing that the conflicts and complexities obvious from a plain reading counsel that this case be conducted by individual parties or by such small groups of parties as may be appropriate.[7] In my view, the existence of conflicting theories of recovery not only reveals the plaintiffs' failure to demonstrate that the common issues predominate but also reveals the inadequacy of a single representative for these disparate theories.

The majority also never addresses the complex question of comparative fault. For example, a class member whose payment was delayed but ultimately paid in 1996, when TPCM was the sole claims administrator, might prove that TPCM's mismanagement rendered it 100% liable for the class member's injury, whether it be damage to credit rating or emotional distress. In that case, the failure of the

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[7] The majority's treatment of the plainly pleaded direct theory of liability is mystifying. Perplexingly, the majority relies upon the liberal theory of pleadings to justify its excision of a pleaded theory of liability from the complaint, seemingly for the convenience of its certification analysis. *Ante* at 22. Having excised that theory of liability from the complaint, the majority then treats with indignation what it calls my "disingenuous" suggestion that rewriting the complaint has done a disservice to an identifiable group of plaintiffs. *Ante* at 23 n.8. Making reference to exceptions to claim-splitting and the opt-out feature of Rule 23 to surround its selective redrafting of the complaint in an air of legitimacy, the majority does little to address why it is fair to any plaintiff to excise a timely pleaded theory of recovery from the complaint, leaving any plaintiffs wishing to assert the theory they thought they had alleged to plead it anew, albeit now likely untimely. I would rather give the plaintiffs the benefit of the fullness of their claims as timely plead, in accordance with the liberal theory of pleadings.

Plan would be irrelevant to the cause of the delayed payment. Another class member, whose payment was delayed or went unpaid in the summer of 1997, shortly after claims management went in-house at Fidelity, might ultimately prove that TPCM was 42% or 70% liable, or even 0% liable if TPCM proved that some independent inadequacy of Fidelity caused a particular claim to go unpaid. Yet another class member, whose claim went unpaid in 1999, almost two years after claims administration went in-house, might be able to prove even lesser responsibility on TPCM's part. The evidence necessary to establish comparative fault -- evidence regarding what TPCM did wrong in a particular case versus what Fidelity did wrong in that case -- would require a second presentation during individual trials of much of the evidence, albeit individualized, that the majority believes the certified class structure allows to be presented only once. And, of course, a given class member's negligence in getting the proper paperwork to the insurer could constitute a cause of delayed payment or nonpayment, which negligence would bar recovery if that negligence exceeded that of the administrator. *See Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 325 S.C. 507, 482 S.E.2d 569, 571 (S.C. Ct. App. 1997) ("[A] plaintiff in South Carolina may recover only if his negligence does not exceed that of the defendant's").

Even apart from the direct-indirect claims problem and the individualized comparative liability questions, which include inquiries into intervening causes of maladministration in particular cases, the individual questions of entitlement to payment under the terms of the Plan and the amount of any such entitlement also loom. This would surely require, among other things, submission of proof relating to timely filing of a claim, proof of medical services rendered, and the like. Indeed, some claimants have had their claims qualified for coverage but not payment, and some have not been qualified for coverage. Those whose claims have been adjudicated may challenge the benefits determination, and TPCM has already indicated that it intends to look at the accuracy of individual claims adjudications, if they will be determinative of liability. Those whose claims have not yet been adjudicated would have to establish the facts that would qualify them for coverage, which would include the nature of the illness or injury for which the claim is made, deductibles and exclusions, doctor documentation, and similar matters. And, of course, as the district court noted, in addition to all of this, "an individualized inquiry is necessary for damages such as damage to one's credit rating as well as emotional distress and mental anguish."

It is thus difficult to conceive what advantage is gained by certifying a class premised on such a sliver of commonality. The individualized evidence necessary to determine (1) comparative liability of TPCM versus Fidelity based, in part, on the date the class member (or medical provider) filed a claim, (2) the class member's (or medical provider's) negligence, if any, in causing the claim to be delayed or go unpaid, (3) any intervening causes of maladministration, (4) the class member's entitlement to payment based on the nature of the services received and whether they are covered, (5) the amount of entitlement, considering copayments due, deductibles, and other sources of benefits, and (6) the existence and amount of other damages, such as mental anguish, will surely require presentation of substantially all of the evidence necessary to make the unhelpful determination that TPCM was *a* cause of the Plan's failure. And to the extent the Plan's failure can be shown to be a cause of a class member's injury -which will not always be the case, of course -- there remain questions of whether there were *other* parties potentially responsible for the Plan's failure.

Because the complaint alleges seven distinct causes of action and the district court has determined that approximately one-half of these claims will have to be resolved through individual trials, the resulting complexity itself should counsel against class-action treatment. Neither the district court nor the majority have even begun to address how the trials and mini-trials will proceed; how the law of the case or res judicata will be applied; and how evidence will be received when most of it will relate to various individual plaintiffs, individual defendants, and individual claims. The combination of the various trials -- up to 1,400 mini-trials, individual full trials as to all defendants on civil conspiracy, RICO violations, and

South Carolina statutory violations, and a class-action trial involving the differing claims against TPCM -- will produce a hodgepodge of factual findings and legal rulings, perhaps conflicting, that will have to be sorted out and applied either by the jury or by the court as the law of the case. This will create a minefield for legal error.

Given the overwhelming breadth of the issues reserved for separate full trials and individual mini-trials, I conclude that the common issues in this case do not predominate over the individual ones. *Amchem,* 521 U.S. at 624 ("Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard").

In addition, the substantial judicial effort required to manage procedurally a case in which the same evidence will be presented to the court both individually and on a classwide basis is not justified by the minimal contribution to the case that an answer to the certified question provides. It is questionable whether, in fact, any time will be saved by certifying the class against TPCM. In any event, the procedural nightmare such a certification invites cannot be thought to come close to satisfying the requirement of Rule 23(b)(3) that the class structure be superior to other available methods of adjudicating the controversy.[8] *See* Fed. R. Civ. P. 23(b)(3).

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[8] The majority finds comfort in running to the "conditional" aspect of certification, stating that "we are only approving a *conditional* certification of the case, and . . . in the unlikely event the case becomes a 'procedural morass,' . . . we are confident that the district court will . . . decertify the class." *Ante* at 44. This view defaults our responsibility and employs a backward burden in demonstrating the superiority of the class action device. The majority apparently believes that no matter how complex, a complaint comes to the court bearing an entitlement to certification unless the court can prove why it should not be certified. This view is reflected in the court's willingness to excise inconvenient theories of recovery from the complaint and its willingness to elevate Rule 23(c)(4) to allow certification of any common issue, presumably subject to some unspoken limiting principle. But the fact remains that a class action is an "*exception* to the usual rule" that litigation is to be pursued by the individual parties, Califano, 442 U.S. at 700-01 (emphasis added), that the party seeking certification *bears the burden* of proving satisfaction of the class-qualifying criteria of Rule 23(a) and (b), and that the court is to measure plaintiff's ability to meet that burden against the action as alleged in the complaint. The alternative I suggest, therefore, is that this case proceed according to the usual rule that the claims be asserted by the individual named parties, and I note the availability of our rules of civil procedure to achieve economy even without a class action. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 391 (1967)("The procedural alternatives are hardly confined to the class action, on the one side, and the individual uncoordinated lawsuits, on the other; there are often other possibilities ranging from use of a model action to consolidation or coordination of the numerous individual actions for all or selection purposes")(citation omitted).

Thus, taking the class against TPCM as the district court has defined it in its September 28, 2001 order, one can only conclude (1) that the questions of law or fact common to members of the class do not predominate over the questions affecting individual members and (2) that the class-action process is not superior in this case. The majority's conclusion to proceed with one or two issues to the contrary, through class treatment under Rule 23(c)(4)(A) in my view, enlarges the reach of Rule 23(b)(3) beyond its proper scope because the constraints of predominance and superiority have not been applied.

I also believe that the class, as conditionally certified, does not satisfy the requirement that the class representatives fairly and adequately protect the interests of all of the class members. *See* Fed. R. Civ. P. 23(a)(4). In my view, the majority ignores overt conflicts of interest existing among members of the conditionally certified class. Fundamentally, it does not mention or attempt to explain how the conditionally certified class may include, on one hand, employers seeking rescission of the insurance contract and return of the premiums paid, and, on the other hand, employees seeking enforcement of the insurance contract and benefits due under it. In addition to this conflict, the employee class members have potential common-law claims against their employers, who purchased the Plan, for negligence or for misrepresenting the Plan.[9] The incompatible relief sought by the employers and the employees alone precludes adequate representation of both groups by one representative, and this concern is only heightened by the potential for lawsuits by employees against the employers. While the majority addressed only some of the conflicts presented, it gave any notion that conflicts are untenable in class representation the back of its hand.

The district court also recognized some of these conflicts but resolved them only with the observation that they could be cured by the class members' right to opt out of the class action. But this observation does not address a fundamental deficiency of a conflict among class members nor the burden that the plaintiffs must carry in seeking to represent the class as a whole, including those who, for whatever reason, never opt out. Federal Rule of Civil Procedure 23(a)(4) requires plaintiffs, as purported representatives of the class, to demonstrate that they can fairly and adequately protect the claims of class members. They obviously cannot fulfill this responsibility if some class members' claims are in conflict with others' claims. *See Amchem*, 521 U.S. at 626-28 (finding the plaintiffs could not fairly and adequately represent a class where, within the class, there was a "disparity between the currently injured and exposure-only categories of plaintiffs" making asbestos claims).

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[9] It may well be, as the majority notes, that many of the claims the employees may have against their employers are now barred by the statute of limitations, depending on what theory of when a third-party claim accrues is applied.

Given the relatively insubstantial common issues shared by only some of the class members and the irreconcilable conflicts of interest inhering in the certified class, I do not agree with the majority that this case is "strikingly similar" to *Central Wesleyan*. *Central Wesleyan* was an asbestos removal case in which 16-23% of America's colleges and universities were potential class members and which involved dozens of defendants and hundreds of asbestos products sold over decades. 6 F.3d at 181, 189. The issues conditionally certified for class treatment were "primarily factual," *id.* at 189, in a context where "the sheer volume of litigation" in the area impelled many courts nationwide to conclude tentatively that class treatment of certain common factual issues in this very particular type of litigation advanced judicial economy and fostered settlement, *id.* at 181-83, 185. Conditionally certifying the primarily factual questions for class treatment, the court held, would relieve the colleges and universities of the need "to prove over and over when defendants knew or should have known of asbestos' hazards, or whether defendants engaged in concerted efforts to conceal this knowledge, or even whether certain of defendants' products crumble and release dust under hand pressure." *Id.* at 185.

This case is unlike *Central Wesleyan*. This is not a massive nationwide litigation in which resolving certain primarily factual questions on a classwide basis would substantially reduce repetitive factfinding. The only question certified here is whether TPCM was "a cause" of the Plan's failure, which is a mixed question of fact and law, and which, as noted, is only the first step in a causation inquiry that is steeped in necessary individualized determinations requiring the presentation of often duplicative evidence. While the court in *Central Wesleyan* countenanced individualized inquiries as to damages, it noted that the potential for individualized inquiries relating to liability could "pose management difficulties and reduce the judicial efficiency sought to be achieved through certification," indicating that decertification might be warranted. *Id.* at 189. Here, the need for individualized determinations as to causation is not hypothetical or even unique to a few class members but rather is a characteristic of every claim of every class member.

The complexity of this case counsels that our decisions in *Broussard* and *Lienhart* are far more apt comparisons than *Central Wesleyan*, portions of which may even have been superseded by the Supreme Court's analysis in *Amchem*. In both *Broussard* and *Lienhart*, we concluded that the district court abused its discretion in certifying the class. In neither of those actions was there such an array of individual actions that required individual adjudication as those presented in this case. Indeed, in *Lienhart* we stated that the requirement of individual trials on damages causation alone would require a finding that the predominance requirement of Rule 23(b)(3) was not met. 255 F.3d at 149. The majority glosses over the complexities in this case, overlooking what clearly distinguishes this case from *Central Wesleyan*.

Rule 23(b)(3) was designed to effect efficiencies without sacrificing procedural fairness. As the Advisory Committee Notes to the 1966 amendments to Rule 23 state:

> Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

The drafters of Rule 23 understandably counseled a cautious approach with respect to Rule 23(b)(3) classes, recognizing that even under their limited understanding as to how broadly it might apply, the idea was adventuresome and was not "as clearly called for" as class actions under (b)(1) or (b)(2). *See Amchem*, 521 U.S. at 615. This cautious and constricted approach to Rule 23(b)(3) envisioned by its authors should not be relaxed now simply by the passage of time and the additional experience that courts have had with the Rule. Such comfort would tend to transmogrify what is already an adventuresome experiment into one applied for its own sake and not for the sake of procedural efficiency and fairness. As the Court stated in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861, 144 L. Ed. 2d 715, 119 S. Ct. 2295 (1999), "we are bound to follow Rule 23 as we *understood it upon its adoption*, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." (Emphasis added). Because of its already adventuresome contours, the original understanding of Rule 23(b)(3) class actions clearly contemplated that courts would conduct a "close look at the predominance and superiority criteria." *Amchem*, 521 U.S. at 615. Disapproving any metamorphosis of the rule, the Court stated in *Amchem* that, while a 23(b)(3) class action was thought to be the most adventuresome innovation of the 1966 amendments, *id.* at 614, "in the decades since the 1966 revision of Rule 23, class action practice has become even more 'adventuresome,'" an example of which was before the Court, *id.* at 617.

Although the district court's efforts in patching together a certifiable class against TPCM may be well-intended, energetic, and indeed, even creative, the class is nonetheless far too adventuresome simply to resolve a few common issues, seriously risking the creation of procedural unfairness. Predict as we can how this case might be tried as it is now structured, I see only a queue of problems that sacrifice procedural fairness and have the potential for creating legal error. Without forecasting how the numerous claims might be adjudicated to secure the "just, speedy, and inexpensive determination" of each claim, Fed. R. Civ. P. 1, I conclude that the plaintiffs' effort to proceed against TPCM under Federal Rule of Civil Procedure 23(b)(3), as certified by the district court in its order of September 28, 2001, is neither "convenient" nor "desirable," *Amchem*, 521 U.S. at 615, and that such a structure amounts to an adventuresome embrace that is too enthusiastic for Rule 23's possibilities.

Accordingly, I would vacate the entirety of the district court's order of September 28, 2001, and remand this case for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-211
CA-98-2659-2-23

HEALTHPLAN SERVICES, INCORPORATED; THIRD PARTY CLAIMS MANAGEMENT, INCORPORATED

Petitioners,

No. 01-214
CA-98-2659-2-23

MICHAEL R. REQUA; ARNOLD H. VALENTINE; FINANCIAL BENFITS, INCORPORATED; LEWIS H. WADE; BRUCE RYALS; FRANKIE FORT; GEORGE GRADEK; TINA MESSINGER; KENNETH EVERY ANDREWS; RAYMOND R. OLIVI; EXECUTIVE CONSULTANTS INSURANCE AGENCY; MICHAEL MASSEY; ANCHOR INSURANCE AGENCY; JOHN COLLINS

Petitioners.

Filed: November 30, 2001
[ENTERED: NOVEMBER 30, 2001]

ORDER

Petitioners have filed petitions for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b).

The Court grants the petitions for permission to appeal.

The denies the letter motions to add parties filed by Colonial Life and Accident Company and David White in case 01-214.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C.A. #2:98-2659-23

Mary B. Gunnells, et al.,

Plaintiffs,

v.

Fidelity Group, Inc., et al.,

Defendants.

Filed September 28, 2001
[ENTERED: SEPTEMBER 28, 2001]

ORDER

This matter is before the court upon Plaintiffs' Motion for Class Certification pursuant to Rule 23, Federal Rules of Civil Procedure. Plaintiffs filed this motion on January 8, 2001, and Defendants oppose this motion. For the following reasons, the court conditionally certifies the proposed classes as modified by this Order.

I. BACKGROUND

In very general terms, this action arises from the marketing and sale in South Carolina of a health benefits plan known as the Fidelity Plan. Plaintiffs are persons and businesses who purchased health insurance from or through the Defendants. Defendants include: individual insurance agents who sold the insurance plan at issue, insurance companies whose agents sold the plan, a third-party claims processor, and the entities compromising the insurance plan itself.[1]

The Fidelity Plan was created and organized by the Fidelity Defendants.[2] Defendant Healthplan Services, Inc./Third Party Claims Management, Inc. ("TPCM") was the third party administrator which processed medical claims under the Plan pursuant to an April 1995 contract with Fidelity. This contract was terminated on May 1, 1997. The Agent Defendants are licensed South Carolina insurance agents and agencies who marketed and sold the Fidelity Plan to South Carolina businesses as a group health benefit plan for their employees.

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[1] All proceedings against those persons and entities making up the insurance plan itself-the "Fidelity Defendants"-are subject to a stay issued by this court based upon related proceedings in the Eastern District of New York. These defendants are: (1) Fidelity Group, Inc.; (2) National Association of Business Owners and Professionals ("NABOP"); (3) International Workers Guild, Inc. (a/k/a International Workers Association) ("IWG"); (4) IWG Health and Welfare Fund; and (5) Fidelity Claims Management, Inc.

[2] The Fidelity Plan made health care coverage available through the IWG Health and Welfare Fund (the "Fund"). Sometime in 1995, the IWG and NABOP collectively bargained and created the Fund to provide health, dental, and other benefits.

The Fidelity Plan was marketed in South Carolina from approximately August 1996 to June 1997. During this period, Fidelity provided marketing materials and training sessions to agents. Complaints that claims were not being timely paid or paid at all began to surface. These problems persisted and eventually in June 1997 the South Carolina Department of Insurance served a cease and desist order on all known agents marketing the Plan. Also, the United States Department of Labor filed suit regarding the Plan in the Eastern District of New York in 1998. *Secretary of Labor v. Fidelity Group, Inc. et al.*, CV-98-7683. The district court in that proceeding appointed an independent fiduciary to monitor and oversee the Fund, and this independent fiduciary requested the Fund be terminated. The Eastern District of New York terminated the Fund effective January 31, 1999.

II. STANDARD

Plaintiffs carry the burden of establishing each of the requirements for a class action. *In Re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989). Whether the proponent of certification has met his or her burden is left to the trial court's discretion and will be reversed only for abuse. *Windham v. American Brands, Inc.*, 565 F.2d. 59, 65 (4th Cir. 1977). The court must conduct "a rigorous analysis" of the particular facts related to class certification in deciding the motion. *See id.* If plaintiffs fail to establish any of the requirements, the court must deny the motion for class certification. *See Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 624 (3d Cir. 1996), *aff'd sub nom., Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The court is prohibited from conducting a preliminary inquiry into the merits of the suit in making this determination. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). However, while the court should not attempt to consider the merits or the probability of Plaintiffs' success on the merits, "[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (footnote omitted).[3]

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[3] As the United States Supreme Court stated in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 469. Further, " '[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. The typicality of the representative's claim or defenses... and the presence of common questions of law or fact are obvious examples. The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits.'" *Id. at* 469 n. 12 (quoting 15 Charles A. Wright, et al. *Federal Practice and Procedure* § 3911 (1976)).

Rule 23 of the Federal Rules of Civil Procedure establishes a two-part test for class certification. First, the action must satisfy all elements of Rule 23(a)-numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). To satisfy the typicality and adequacy elements, a proposed representative must at least have a claim himself. *McClain v. South Carolina Nat. Bank*, 105 F.2d 898, 903 (4th Cir. 1997).

Additionally, the action must satisfy the requirements of either Rule 23(b)(1), 23(b)(2), or 23(b)(3). Under Rule 23(b)(3), which is applicable to the present case, the requirements are two-fold: "Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem*, 521 U.S. at 615.

III. DISCUSSION

Plaintiffs offer the following class for certification:

> All entities and persons who purchased THE FUND's health care and/or dental coverage or were provided with said coverage in South Carolina at any time from August 15, 1995 through the present. Plaintiffs' Class specifically excludes:
>
> a. Defendants and their employees;
>
> b. Persons who have already commenced legal action against the Defendants or others for the actions complained of in this complaint;
>
> c. Persons who, upon notice, indicate their desire to be excluded from this Class by opting out of the Class at a reasonable date to be set by the Court.

(Second Amended Compl. ¶ 108.) Plaintiffs also suggest that certain claims against the Agent Defendants, such as civil conspiracy and RICO claims, may be treated on a class-wide basis. However, the remainder of the claims[4] against Agent Defendants are more agent-specific requiring subclass treatment as follows:

> All entities and persons who purchased or were provided THE FUNDS' health care and/or dental coverage from a particular DEFENDANT AGENT (or group thereof) in South Carolina at any time from August 15, 1995 through the present.

(Second Amended Compl. ¶ 119.)

A. TPCM

1. Numerosity

Numerosity requires that a class be so large that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The exact number of class members need not be pleaded or proved, but impracticability of joinder must be positively shown and cannot be speculative. *Gomez v. Comerford,* 833 F. Supp. 702, 706 (N.D. Ill. 1993). TPCM contends that Plaintiffs have not offered any evidence that the proposed class is so numerous rendering joinder of those class members whose claims went unpaid because of TPCM's conduct impracticable. Specifically, TPCM states "Named Plaintiffs have not provided any credible evidence of a claim remaining unpaid as a result of alleged improper actions or inaction of TPCM or any calculable damages attributable... to TPCM." (Def.'s Mem. in Opp. at 45.) However, the court is not currently faced with deciding a motion for summary judgment. *See Eisen*, 417 U.S. at 177-78 (court is prohibited from conducting a preliminary inquiry into the merits of the suit in making a class certification determination). Instead, accepting Plaintiffs allegations for the purposes of this class certification, Plaintiffs have alleged that TPCM contributed to the ultimate failure of the Plan resulting in damages to the class members. Approximately 1400 employees plus their families were covered by the Fidelity Plan, (Upp Dep. at 41-42), and possibly 2900 claims may have gone unpaid. Such a large number of potential litigants suggests that the numerosity requirement is easily met.

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[4] These causes of action are Unfair and Deceptive Trade Practices, Negligent Undertaking, Fraud, Negligent Misrepresentation, and Breach of Contract against the various Defendant Agents from whom Plaintiffs purchased or received healthcare coverage under the Plan.

2. Commonality and Typicality

Commonality requires that "there are questions of law or fact common to the class." Fed R. Civ. P. 23(a)(2). The common questions must be dispositive and over-shadow other issues. *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990). Typicality requires that the claims of the named class representatives be typical of those of the class; "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation marks omitted). However, the commonality and typicality elements do not "require that members of the class have identical factual and legal claims in all respects." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

As an initial matter, it is necessary to identify and understand the nature of Plaintiffs' claims against TPCM in order to evaluate whether commonality and typicality exist as to these claims. In simple terms, Plaintiffs have alleged that TPCM's mismanagment of processing claims contributed to the failure of the Fidelity Plan.[5] Thus, TPCM's conduct contributed to the inability of the Plan to pay claims resulting in the Plaintiffs' damages. In other words, Plaintiffs allege that TPCM violated its duties, both contractual and at law, as third party administrator of the Plan and such conduct was a cause of the Fidelity Plan's failure. Further, the Plan's failure directly injured Plaintiffs and the absent class members.

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[5] An example of TPCM's alleged mismanagement of its duties was its failure to process claims in a timely manner. Plaintiffs allege that when Fidelity undertook to process the claims after the termination of the contract, there was substantial backlog of unpaid claims. Further, Plaintiffs allege this backlog as well as delays in the claims processing procedure contributed to the loss of participants in the plan resulting in a loss of payments supporting the Plan. Plaintiffs' allege that all of these circumstances, *inter alia*, contributed to the failure of the Plan.

TPCM's central argument that the prerequisites of commonality and typicality are lacking in this action is that Plaintiffs' claims necessitate individual analysis as to liability and damages attributable to TPCM as well as individual proof of damages for each putative class member. Specifically, TPCM argues that individual issues abound regarding the proximate cause of the Named Plaintiffs' and absent class members' injuries as well as the nature and extent of their damages.[6]

TPCM argues that a finding of actionable negligence requires proof of proximate cause as to damages, and that an individualized inquiry into each putative class member's circumstances is required in order to establish or refute such proof. For example, TPCM contends that some of the unpaid medical bills were claimed after TPCM's contract to administer the Plan had expired. Thus, TPCM's conduct could not be the proximate cause of the failure to pay those claims. This argument is unavailing because it ignores the nature of Plaintiffs' allegations. If Plaintiffs prove that TPCM's conduct contributed to the failure of the Plan, the injuries resulting from that conduct clearly could have arisen after the contract had expired. Therefore, Plaintiffs' allegations, if proven, will vitiate any need to demonstrate that a particular claim was submitted prior to the expiration of the contract between TPCM and Fidelity. To hold otherwise and deny certification based on this ground would require the court to improperly condition its decision based on the merits of the case. *See Eisen,* 417 U.S. at 177-78.[7]

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[6] The court notes that TPCM in an abundance of caution makes specific arguments regarding the individualized nature of proving the element of reliance in certain claims asserted by Plaintiffs. However, the court will not address these arguments because Plaintiffs have stated that reliance is not an issue in the claims asserted against TPCM (negligence and contract).

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[7] This argument is similar to TPCM's claim that none of the named Plaintiffs have standing to bring this action. In order to have standing, a plaintiff must demonstrate an actual or threatened injury which is "distinct and palpable." *See eg. Allen v. Wright,* 468 U.S. 737, 751 (1984). Further, "[t]he injury must be 'fairly' traceable to challenged action, and relief from the injury must be 'likely' to follow from a favorable decision." *Id.*

TPCM challenges whether Plaintiffs' injuries are fairly traceable to TPCM's alleged wrongdoing. TPCM contends that no Named Plaintiffs have testified or demonstrated that they were injured by TPCM. Specifically, TPCM, citing the deposition testimony of various Plaintiffs, again argues that many of the unpaid claims occurred after the termination of TPCM's contract with Fidelity. While it appears that several Plaintiffs did not have problems with claims until after the contract between TPCM and Fidelity had been terminated, Plaintiffs have alleged that TPCM's conduct was a cause of the Fidelity Plan's failure. Clearly, if TPCM's alleged conduct did not contribute to the failure of the Fidelity Plan, any resulting injuries arising from the failure of the plan would be fairly traceable to TPCM's alleged actions (or inaction). Therefore, the Named Plaintiffs' have standing to bring this action.

TPCM, focusing on the alleged damages of unpaid medical bills, also contends that an individualized inquiry is required into why each class member's claim was not paid.[8] Plaintiffs seek the following damages:

> The employee Plaintiffs and their covered family members seek recovery for all legally allowable damages including refunds of premiums paid, payment of outstanding medical/dental bills, reimbursement for medical bills paid by Plaintiffs where treatment occurred while Plaintiff was covered by the Plan, compensation for injury to credit, compensation for injury to ability to obtain credit, time spent and costs incurred attending to the difficulties resulting from the failure of the Plan, and loss of enjoyment of life attendant to the stress caused by the failure of the Plan. Among other things, the Plaintiff businesses seek recovery for premiums paid for the worthless insurance.

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[8] TPCM's arguments do not address the damages of paid premiums sought by Plaintiffs, and the court notes that many of the alleged individualized proof issues raised by TPCM have no applicability to paid premium damages.

(Pls.' Mem. in Support of Class Certification at 5.)[9] TPCM contends several valid reasons existed independent of any alleged improper conduct on its part which explain why claims were not paid at all or paid in full.[10] Specifically, TPCM may not have paid a claim because": (1) TPCM could have requested additional information to process the claim which it never received; (2) the class member had not met the deductible; (3) there were unresolved co-payment issues; (4) applicable penalties may have existed preventing payment of the claim;[11] (5) the Plan may not have covered the claim; (6) plaintiff may not have submitted the claim to TPCM for adjudication; or (7) the claim was properly forwarded to Fidelity Claims Management at or about the time TPCM's contract expired and Fidelity's mismanagement caused any problems in the payment of the claim. Thus, TPCM contends that to determine whether the cause of medical bills going unpaid was due to any alleged misconduct on the part of TPCM or one of the valid reasons offered above which are not attributable to any misconduct requires an individualized inquiry of each putative class member's circumstances.

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[9] The Second Amended Complaint also seeks "mental anguish, emotional distress and other injuries related to the injury to their reputations and credit ratings." (Second Amended Complaint at ¶ 217.)

[10] In essence, these alleged valid reasons are really defenses as to why medical bills went unpaid. Therefore, this argument basically echoes the proposition that individualized defenses can destroy commonality. *See, eg., Broussard,* 155 F.3d at 342.

[11] TPCM does not clarify what these possible penalties were or why they might be triggered.

Plaintiffs counter that such individualized analysis of claims is unnecessary because the outstanding claims for medical bills have already been adjudicated; therefore, none of TPCM's offered reasons for claims to have gone unpaid are applicable to the putative class members' unpaid bills. To support this contention, Plaintiffs rely on an affidavit by Defendant Eugene Duncan, one of the Fidelity Defendants responsible for creating and managing the Plan, which states:

> The unpaid claims have, *for the most part*, been entered or adjudicated and could easily be reproduced via computer. The whole claims processing system, both at Fidelity and TPCM is a computer system, which requires little individual analysis. Claims data is entered into the computer program and the appropriate decisions about coverage are determined by the program and necessary paperwork is generated with little human decision making involved.

(Duncan Aff. ¶ 27) (emphasis added). The court agrees that all adjudicated claims should not require individual inquiries. However, Duncan's affidavit does not unequivocally state that all outstanding claims have been adjudicated. Therefore, any unpaid claims which have not been adjudicated could conceivably be subject to any of the above-offered reasons as to why these claims may not have been paid. However, this difficulty is easily addressed because, as discussed below in further detail, Plaintiffs seek to have mini-trials regarding certain individualized damages issues. If such bifurcation is proper, the issue of proximate cause as to non-adjudicated unpaid claims for medical bills could be addressed in such a setting. If it becomes apparent that due to the high numbers of putative class members whose claims have not been adjudicated this strategy becomes unmanageable, the court could simply require that any putative class member who has unpaid claims for medical bills demonstrate that their claim has been adjudicated according to TPCM or Fidelity's records. Such a requirement would eliminate the need for individual inquiries into why claims were not paid and would not be burdensome or unmanageable.

TPCM also contends that an individualized inquiry is required as to alleged "mental anguish or emotional distress" and harm to credit ratings and reputations. Plaintiffs do not disagree. However, they propose bifurcating these issues from the common issues with the individual issues being decided in mini-trials related to damages. Rule 23(c)(4) provides that:

> When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

Fed. R. Civ. P. 23(c)(4). Many courts have utilized bifurcation of individualized damages issues which were distinct from common issues of liability. *See eg., Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 188-90 (4th Cir. 1993); *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 45, 47 (E.D. Va. 1981); *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100, 113 (E.D. Va. 1980). This course of action, if appropriate, would alleviate the commonality concerns raised by TPCM. The court will consider whether such action is appropriate in this case when it considers the requirements of Rule 23(b)(3).

As noted ~~above,~~ Plaintiffs point to various factual and legal issues pertaining to TPCM's conduct which are common to all Plaintiffs and class members. All of the Plaintiffs and absent class members were covered by the Fidelity Plan and TPCM processed claims for them pursuant to a contract with Fidelity. Plaintiffs allege that TPCM failed to accurately and timely process claims. Further, that TPCM caused backlogs of claims and confusion and its mishandling of the claims caused and/or contributed to the ultimate failure of the Fidelity Plan and this affected the Plaintiffs and absent class members in substantially the same way.

Therefore, assuming bifurcation is appropriate for the purposes of the commonality and typicality requirements and given Plaintiffs' allegations against TPCM, Plaintiffs and absent class members share common issues of fact and law which must be considered in their actions against TPCM. These common issues include, but are not limited to: (1) facts surrounding how TPCM managed its operations; (2) whether it created a backlog of claims; (2) whether it failed to enter claims into its system; (3) whether it breached its contractual duties; (4) whether TPCM's alleged negligence proximately caused Plaintiffs' injuries by contributing to the failure of the Plan.

3. Adequacy of Representatives

This element requires that the class representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem*, 521 U.S. at 625-26. TPCM first challenges the adequacy of the named Plaintiffs as representatives of the class because they are not members of the class they seek to represent. This contention, like TPCM's typicality, commonality and standing arguments, is based on the supposition that many of the problems concerning non-payment of the named Plaintiffs' medical bills arose after TPCM was no longer administering the Plan. The court has already concluded that such circumstances may not shield TPCM from fault if Plaintiffs' allegations are proven true regarding TPCM's part in causing the Plan to fail.

TPCM also recasts its commonality and typicality arguments regarding individual defenses against each named Plaintiff. Specifically, TPCM will seek to introduce evidence that it never received a claim from Mrs. Gunnells or any of her health providers, and any alleged unpaid claims were due to problems unrelated to TPCM and arose after the contract had expired.[12] As noted above, the argument regarding problems with such claims arising after the contract expired is unavailing as TPCM's conduct could possibly be shown to have proximately caused damage after the expiration of the contract. As for Cynthia Mullinax, TPCM intends to offer evidence that only one of her claims was not paid and that was because she failed to provide requested information sufficient to pay the claim. These concerns are alleviated by the court's conclusion that these individualized issues can be addressed in a bifurcated proceeding or alleviated by requiring putative class members to demonstrate that their unpaid claims have already been adjudicated.

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[12] The court notes again that this argument does not address the damages sought for recovery of premiums paid.

TPCM also suggests that the named Plaintiffs do not possess the necessary knowledge about the case to serve as adequate representatives. However, "[i]n a complex lawsuit, such as one in which the defendant's liability can be established only after a great deal of investigation and discovery by counsel against a background of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative." 32B Am. Jur.2d § 1888 (1996) (footnotes omitted).

Finally, TPCM contends that a potential conflict between employee Plaintiffs and employer Plaintiffs exists which renders the named Plaintiffs inadequate. "The adequacy inquiry...serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem,* 521 U.S. at 625. TPCM suggests that one or many of the putative class members who are employees of certain corporate Named Plaintiffs may wish to include their employers as defendants in a suit to recover their unpaid medical bills. TPCM cites deposition testimony which demonstrates that the decision to use the Fidelity Plan was in many cases a unilateral one on the part of certain employers. *See* (TPCM's Mem. in Opp. at 40-42.) TPCM contends that just as Plaintiffs have sued the Agent Defendants, some class members may wish to assert fraud, misrepresentation, or negligence claims against their employers for failing to properly investigate the Fidelity Plan. However, TPCM fails to identify a viable cause of action by employees against their employers.[13] Further, any employee class member wishing to sue their employer as well could opt out of the class. Given these points, the court does not find that a potential conflict exists warranting denial of the class on adequacy grounds.

4. Rule 23(b)(3)

(a) Predominance

In a class action brought under Rule 23(b)(3), the "commonality" requirement of Rule 23(a)(2) is "subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over" other questions. *Amchem,* 521 U.S. at 609. This predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. Whereas the commonality prerequisite "addresses the issue of whether Rule 23 has any applicability at all to the law suit, Rule 23(b)(3) addresses the issue of whether Rule 23 certification will have practical utility in the suit, considering the facts, substantive law, procedural due process, and fundamental fairness." *Brown Cameron-Brown Co.*, 92 F.R.D.32, 42 (E.D. Va. 1981).

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[13] TPCM cites several cases where an employee sued an employer to recover health benefits. *See* (TPCM's Mem. in Opp. at 42 n.46.) However, these cases dealt with ERISA plans and are inapplicable to the present action.

TPCM again recasts its commonality argument that the individualized nature of the claims process will require an individualized inquiry into each class member's allegations against TPCM. Thus, this "necessary" individualized inquiry results in individual questions predominating over common ones. As stated numerous times, any individualized issues regarding unpaid, non-adjudicated claims and other individualized damages can be dealt with if bifurcation is proper, or if all Plaintiffs and class members seeking damages for unpaid claims are required to show their claims have been adjudicated.

To avoid the predominance of the admittedly individualized damages issues over the common issues, Plaintiffs seek to bifurcate the individualized damages determinations. "The presence of issues particular to individual plaintiffs may necessitate the court's employing the second element of Rule 23(c)(4), bifurcating the class action between issues." *Brown*, 92 F.R.D. at 47. Rule 23(c)(4) provides courts with the flexibility and the authority to "treat common things in common and to distinguish the distinguishable." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 35 (5th Cir. 1968). Severance of issues may allow the class to establish TPCM's liability to the class "while reserving the proof and computation of individual plaintiff's damages, as well as any defendant's...for a later proceeding." *Pruitt v. Allied Chemical Co.*, 85 F.R.D. 100, 113 (E.D. Va. 1980). To determine whether such a course of action is proper the court should consider whether the severance of one or more issues would prove advantageous. This consideration focuses upon the issues facing courts regarding whether a class action is the superior method of adjudication.

(b) Superiority

Class certification is proper if the class action is the superior method for the fair and efficient adjudication of the dispute. Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) lists four non-exclusive factors to consider in addressing this issue:

> (A) The interest of members of the class individually controlling the prosecution or defense of separate actions;
>
> (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

> (D) The difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3). Manageability of this class action is of particular concern to the court. As noted above, individualized issues pertaining to damages exist,[14] and Plaintiffs seek to bifurcate those individualized damages issues into a second phase of mini-trials following the first phase determining liability. If Plaintiffs could prove liability on the part of TPCM and that damages were due in the form of adjudicated unpaid claims and premiums paid, these damages could be determined easily without a mini-trial to determine what was owed. The difficulty arises with non-adjudicated claims and damages such as emotional distress and damage to class members' credit. "[T]he issue of manageability of a proposed class action is always a matter of 'justifiable and serious' concern for the trial court and peculiarly within its discretion." *Windham v. American Brands, Inc.*, 565 F.2d. 59, 65 (4th Cir. 1977). The record presently before the court suggests that bifurcation of individualized damages issues and possibly proximate cause issues regarding non-adjudicated claims would not present an unmanageable scenario for the court.[15]

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[14] In particular, an individualized inquiry is necessary for damages such as damage to one's credit rating as well as emotional distress and mental anguish.

TPCM also points to other factors militating against a class action as a superior method of adjudication for this dispute. TPCM argues that the degree of demonstrated interest in individual litigation in this matter is measured by looking at the number of individual suits in South Carolina already commenced. The court does not find the existence of these cases persuasive on this issue. In fact, as Plaintiffs have noted, over 1400 potential litigants exist and the dearth of individual cases filed until now provides support for the conclusion that no great deal of interest exists in individual litigation. Further, the sheer numbers of potential litigants suggests that individual suits would put a drain on the judicial system and TPCM itself. However, the flexibility and control of this action in one forum provides benefits which outweigh the method of individual litigation. Also, while TPCM suggests that damages per class member are not insignificant (pointing to one plaintiff's $70,000 in unpaid medical bills, (Gunnells Dep. 150.)), not all of the Plaintiffs' alleged damages are so high and the damages could run the gamut to much lower figures. This fact also supports the superiority of this action proceeding as a class action.

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[15] The court notes TPCM's reliance on *Windham* to suggest that this case should be deemed unmanageable. However, *Windham* is clearly distinguishable as that case involved over 20,000 potential class members. 565 F.2d at 66.

The court recognizes that while the class mechanism appears superior at this point and the case manageable, given the number of possible class members in this action this manageability could quickly dissipate. Therefore, conditional certification of Plaintiffs' class would be most appropriate in this circumstance. *See* Fed.R.Civ.P.23(c)(1) (an order that a class action is maintainable "may be conditional, and may be altered or amended before the decision on the merits."). The court does so heeding the Fourth Circuit's warning to keep a watchful vigil in a complicated case such as this one to "make certain that manageability and other types of problems do not overwhelm the advantages of conditional certification. *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993). "Should such concerns render the class mechanism ineffective, the district court must be prepared to use its considerable discretion to decertify the class." *Id.*[16]

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[16] TPCM also contends that the South Carolina Unfair Trade Practices Act (SCUPTA) specifically precludes bringing a class action alleging violations of its provisions. S.C. Code Ann. § 39-5-140(a) (Law. Co-op. 1976)(a person "may bring an action individually, but not in a representative capacity, to recover actual damages."). The court agrees and therefore Plaintiffs' SCUPTA claims shall not be certified. *See Johnson v. Collins Entertainment Co.*, Civ. No. 3:97-2136-17 (D.S.C. Sept. 6, 2000)(TPCM's Ex. K).

B. Agent Defendants

All plaintiffs seek to certify a class against all Agent Defendants for their claims of civil conspiracy and RICO[17] conspiracy. Additionally, Plaintiffs seek to certify subclasses for the all the other claims based on the particular Agent Defendant who provided the Fidelity Plan to the subclass members. The court notes that when litigants seek to subdivide a class action into subclasses "each subclass must independently meet the requirements of Rule 23 for maintenance of a class action. A failure to do so will require the dismissal of the action with respect to the subclass or the action going forward with regard to the subclass on an individual basis." 7B Charles A. Wright, et al. *Federal Practice and Procedure: Civil* § 1790, 284-85 (1986).

1. Conspiracy Class

(a) Standing

As an initial matter, Agent Defendants contend that the record demonstrates that Plaintiffs lack standing to bring this action against all of the Defendants. Agent Defendants argue that "[a] representative plaintiff must have individual standing to assert claims against all members of a defendant class"; therefore, Plaintiffs must "demonstrate that any plaintiff has been injured by the conduct of each and every defendant." *Herlihy v. Ply-Gem Indus., Inc.*, 752 F. Supp. 1282, 1290 (D.Md. 1990). Agent Defendants note that virtually every Plaintiff enrolled in the Fidelity Plan through only one Agent Defendant without dealings with any of the other Agent Defendants. Therefore, Plaintiffs could not have been injured by those other Defendants. However, all Plaintiffs have alleged causes of action of civil conspiracy and RICO violations against the Agent Defendants. A litigant has standing against all the co-conspirators if the plaintiff alleges harm as a result of the conspiracy. *NOW, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994).[18]

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[17] 18 U.S.C. § 1961 *et seq.*

(b) Individualized Issues Concerning Plaintiffs' Conspiracy Claims

Issues do exist which cause the court concern regarding the broad class treatment of all Plaintiffs' civil and RICO conspiracy claims against all Agent Defendants.[19] Plaintiffs have alleged that the Agent Defendants conspired with the Fidelity Defendants (along with other Defendants) to injure Plaintiffs by furthering a common scheme-the Fidelity Plan.

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[18] As for Plaintiffs' other causes of action such as negligence and negligent misrepresentation, Plaintiffs seek to pursue those against individuals by subclass claims against the Agent Defendant who sold them the Plan. In such a scenario, standing clearly exists.

[19] The court notes that the parties for the most part do not address the concerns raised by the court in this section.

Specifically, Plaintiffs allege Agent Defendants conspired to (1) sell illegal health care and dental coverage; (2) defraud the Plaintiffs and putative class members by marketing and selling "substantially worthless health care and dental coverage and/or insurance;" (3) induce Plaintiffs and class members to continue making payments in the form of premiums; and (4) enter "into a contract of insurance for employee benefits with the intention of breaching said contract." (Second Amended Comp. ¶ 191.)[20] The allegations most relevant to the Agent Defendants are selling illegal health care and dental coverage and defrauding the Plaintiffs and putative class members by marketing and selling the Fidelity Plan

Plaintiffs suggest there is ample evidence that the Agent Defendants conspired with the Fidelity Defendants. For example, when Agent Defendants were uniformly instructed to present the Plan they were allegedly told to hide certain aspects of the Plan when presenting it to prospective enrollees. Plaintiffs allege that Agent Defendants followed these directives and furthered the conspiracy.

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[20] The allegations in the Second Amended Complaint for civil conspiracy and RICO are fairly similar. The alleged RICO violation is that Defendants participated in a scheme or artifice to defraud by selling "bogus" health and dental care coverage. *See* (Second Amended Compl. ¶ 197.)

However, the court notes a significant problem regarding individualized issues inherent where numerous defendants (in fact a class of defendants) are accused of being part of a vertical conspiracy such as the one alleged in this case. These issues arise primarily due to individualized defenses which may be available to the Agent Defendants. For example, an alleged conspirator need not have knowledge of all the details of the conspiracy, but must participate " 'in the conspiracy with knowledge of the essential nature of the plan.'" *Mylan Labs. v. Akzo,* 770 F. Supp. 1053, 1066-67 (D.Md. 1991) (quoting *United States v. Tillett,* 763 F.2d 628, 632 (4th Cir. 1985)). Though Plaintiffs may properly establish such knowledge through circumstantial or direct evidence, Agent Defendants must also have the opportunity to rebut such proof-an inherently individualized endeavor. That individualized defenses regarding knowledge of the scheme to defraud is not rank speculation, some Agent Defendants enrolled in the Fidelity Plan themselves warranting the reasonable inference that these agents had no knowledge of the essential nature of the scheme to defraud.

Such concerns are also applicable to Plaintiffs' civil conspiracy claims under South Carolina law. A civil conspiracy is the combination of two or more parties joined for the purpose of injuring the plaintiff thereby causing him special damage. *See, eg., Future Group II v. Nationsbank,* 478 S.E.2d 45, 50 (S.C. 1996). An agreement to join for the purpose of injuring someone necessarily requires knowledge of such an agreement, in this case, to sell illegal insurance and defraud customers by selling them worthless insurance. Whether such knowledge exists is necessarily an individual question militating against allowing Plaintiffs' to paint with a broad brush all of the Agent Defendants' knowledge of the conspiracy. A proper adjudication of this issue would require proof of each of the Agent Defendants' knowledge and an opportunity for each Agent Defendant to refute such proof.

Therefore, the court concludes that individual issues regarding Plaintiffs' conspiracy claims predominate rendering class treatment of all Plaintiffs' conspiracy claims against all Agent Defendants unadvisable. *See, eg., Mekani v. Miller Brewing Co.*, 93 F.R.D. 506, 509-10 (E.D. Mich. 1982). Such a conclusion is particularly appropriate given the situation in this case where in addition to Plaintiffs asserting certain conspiracy claims class-wide against all Agent Defendants, the Plaintiffs also seek to assert several claims against subclasses based on each individual agent. These individual conspiracy issues would best be addressed in subclasses with only one Agent Defendant. However, since the court has found that class wide treatment against all Agent Defendants is not desirable, the court will consider whether the Plaintiffs' proffered subclasses should be certified as independent class actions based on each Agent Defendant.

2. Individual Classes Based on Individual Agent Defendants

(a) Numerosity

Agent Defendants challenge whether Plaintiffs have satisfied the numerosity requirement for each subclass. They contend that several Agent Defendants only marketed the Fidelity Plan to a limited number of employers or employees. For example, only two entities enrolled in the Plan marketed by Defendant Lewis Wade. (Wade Dep. at 48.) These entities had only approximately eight employees between them, (Wade Dep. at 59), two of which have brought individual actions against Wade, (Agent Defendants' Ex. 3). Defendant Stephen Lacy enrolled only three employer groups in the Plan consisting of 13 to 14 employees. (Lacey Dep. 86, 87.) While these numbers do not definitively constitute a finding of numerosity, Plaintiffs note that the Agent Defendants fail to take into account the significant number of dependents that were also covered by the Plan. Plaintiffs assert that 11 people Lewis Wade enrolled and 21 people Stephen Lacy enrolled have unpaid claims. While these numbers may fall on the borderline of numerosity, the court finds that numerosity is met as to these Agents as well as the remaining Agent Defendants who dealt with, in some cases, significantly more individuals.[21]

(b) Commonality, Typicality, and Predominance

Agent Defendants argue that class certification should be denied because the underlying law and facts necessitate an individualized analysis of each class member's claims. *See eg. Broussard,* 155 F.3d at 340-44; *Zimmerman v. Bell,* 800 F.2d 386, 390 (4th Cir. 1986).[22] Like TPCM, Agent Defendants contend that an individualized analysis is necessary to determine the amount and the proximate cause of damages each of Plaintiff. This argument in unavailing for the same reasons that TPCM's similar arguments were unavailing. Agent Defendants also focus on the required element of proximate cause in Plaintiffs' causes of action as mandating an individualized inquiry.[23] The court does not view this as a distinct argument and thus it is similarly disposed of by this court's earlier conclusions.

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[21] The court notes that Plaintiffs do not yet have a class representative for every named Agent Defendant. The court grant Plaintiffs' request that it withhold ruling on the certification of the agent classes for which there is currently no representative.

[22] This argument is applicable to the commonality, typicality, and predominance requirements of Rule 23.

However, Agent Defendants do raise several other issues regarding commonality of Plaintiffs' claims that require the element of reasonable reliance. First, Agent Defendants argue that Plaintiffs' claims against them are based on marketing in which oral communications were critical. In *Broussard,* the Fourth Circuit denied class treatment for claims such as negligent misrepresentation and fraud when "built...on the shifting evidentiary sands of individualized representations." 155 F.3d at 341. The court noted that " 'claims based substantially on oral rather than written communications are inappropriate for class treatment unless the communications are shown to be standardized.'". *Id.* (quoting *Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 597 n. 17 (7th Cir. 1993)).

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[23] The causes of action which require a showing of proximate cause are: (1) negligent undertaking; (2) fraud; (3) negligent misrepresentation; (4) civil conspiracy; (5) South Carolina Unfair Trade Practices Act; and (6) RICO. Plaintiffs' breach of contract claims also mandate that for damages to be recoverable they must either "flow as a natural consequence of the breach or must have been reasonably within the parties' contemplation of the contract." *Manning v City of Columbia,* 377 S.E.2d 335, 337 (S.C. 1989)(citing *Kline Iron & Steel Co. v. Superior Trucking Co.,* 201 S.E.2d 388 (S.C. 1978)).

Plaintiffs contend that their case, unlike the plaintiffs in *Broussard,* does not rely heavily on oral communications. All marketing materials had to be approved by Fidelity and significantly all Agents were marketing the same health plan to all Plaintiffs with the same benefits provided by the same from contract.[24] Furthermore, Fidelity trained all Agent Defendants on marketing the plan, and they were given specific language to use as well as told to refer to the Fidelity marketing materials.[25] In light of all this, the written nature of the marketing materials and the oral representations suggest that the communications were standardized, and therefore common issues predominate as to these representations. *See, eg., In re: Prudential Insurance Co. Sales Practices Litigation,* 962 F. Supp. 450, 512 (D.N.J. 1997) ("Prudential agents' use of uniform oral misrepresentations based on Prudential training and uniform sales materials warrants a finding of predominance.").

Agent Defendants also argue that because proof of reasonable reliance or justifiable reliance is an element of Plaintiffs' fraud, negligent misrepresentation, `and RICO claims individualized inquiries are required as to each putative class member. Relying again on *Broussard,* Agent Defendants suggest that "proof of reasonable reliance would depend on a fact-intensive inquiry into what information each [Plaintiff] actually had." 155 F.3d at 341. In *Broussard,* the plaintiffs were franchisees who had various, non-standardized communications with the defendant regarding the advertising account at issue in that case. *Id.* Therefore, information outside of the alleged misrepresentations was available "from conversations with Meineke representatives at final review session or on other occasions, conversations with other franchisees, independent analysis of the applicable [franchise and trademark agreement], audit statements of the [advertising] account..." *Id.* However, the plaintiffs in *Broussard* were of a different character and on different footing than Plaintiffs' in this action. In the instant case, Plaintiffs' were seeking health care and dental coverage and were relying on insurance agents to provide them with effective coverage. Under South Carolina law, such reliance on an insurance agent is reasonable. *See Trotter v. State Farm Mut. Auto. Ins. Co.,* 377 S.E.2d 343, 351 (S.C. Ct. App. 1988) (rejecting the argument that plaintiff had no right to rely on a misrepresentation, held that "in view of the agent's superior experience and knowledge regarding different types of insurance, it was reasonable for the insured to assume the truthfulness of any representations the agent made about the coverage").[26]

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[24] This fact is distinguishable from *Broussard* where the franchise and trademark agreements between the plaintiffs and the defendant all varied. 155 F.3d at 340.

[25] Plaintiffs contend that Fidelity's National Marketing Director and National Sales Director trained each Agent Defendant. (Duncan Dep. 56.)

The court admits that, even when relying on an insurance agent, if a plaintiff has some independent knowledge regarding the agents' representations about the coverage but acts on those representations anyway, reliance may not be justifiable. However, a common sense approach presuming reliance exists may be acceptable in this circumstance.[27] Therefore, in certain cases, "reliance may be presumed for fraud-based common law claims when the alleged omissions and misrepresentations are uniform and material and the class members acted in a manner consistent with reliance." *In re: Prudential*, 962 F. Supp. at 516.

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[26] Furthermore, "an insurance agent or broker must exercise good faith, reasonable skill, care, and diligence" when procuring insurance, and "if, because of his fault or neglect, the agent fails to procure insurance, or does not follow instructions, or the policy issued is void, or materially deficient, or does not provide the coverage he undertook to supply, the agent is liable to his principal." *Sullivan Co., Inc. v. New Swirl, Inc.*, 437 S.E.2d 30, 31 (S.C. 1993). Such duties of insurance agents suggest that no duty exists for a purchaser to do additional research regarding the policy.

[27] The Plaintiffs appropriately cite the following from *Basic v. Levinson*: "'Who would knowingly roll the dice in a crooked crap game?'" 485 U.S. 224, 246-247 (1988)(quoting *Schlanger v. Four-Phase Systems Inc.*, 555 F. Supp. 535, 538 (S.D.N.Y. 1982)).

Accordingly, reliance in such instances will not be found to undermine the predominance of common issues.

Even if the court has erred in its analysis and reliance does threaten the predominance of common issues in this case, that threat can be eliminated by bifurcating the issue of reliance where individual inquiries would be proper. Plaintiffs correctly note that the reliance element in fraud and negligent misrepresentation claims serves to establish "proof of causation-in-fact; the requisite causal connection between the misrepresentation and a plaintiff's injury." (Pls.' Mem. in Reply to Agent Defendants at 20 n.22.)[28]

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[28] To prevail on negligent misrepresentation claim Plaintiffs must demonstrate that "(1) Defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered pecuniary loss as the proximate result of his reliance upon the representation." *Debondt v. Carlton Motorcars, Inc.*, 536 S.E.2d 399, 405 (S.C. Ct. App. 2000).

Under South Carolina law, Plaintiffs must prove nine elements in an action for fraud: (1) a representation; (2) falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity by the maker; (5) an intent by the maker that the representation be acted upon; (6) the hearer's ignorance of its falsity; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Ardis v. Cox*, 431 S.E.2d 267, 269 (S.C. Ct. App. 1993).

"Challenges based on...reliance have usually been rejected and will not bar predominance satisfaction because [reliance pertains] to the right of a Class Member to recover in contrast to underlying common issues of the defendant's liability." 1 *Newberg* § 4.26, at 4-104. "Where all class members must establish the defendant's complicity and liability, thus, the individual issues are secondary and the class should be certified." *In re: Prudential,* 962 F. Supp. at 516 (citing *In re IGI Sec. Litig.,* 122 F.R.D. 451, 460 (D.N.J. 1988)).

Agent Defendants also contend that Plaintiffs' negligence claims against them also require individualized determinations because each Agent performed varying degrees of due diligence. The court agrees that the levels of due diligence undertaken by each agent most likely were different, but such a circumstance is irrelevant to commonality as the structure of the classes deals with this issue individually as to each agent. As between the agent and the class members whom that agent enrolled in the plan, the level of due diligence performed by that agent is a common issue as to all the class members.

(c) Superiority

The court finds that conditionally certifying Plaintiffs' proposed subclasses based on each agent is the superior method of adjudicating this matter. The result of doings so is no different than Plaintiffs' subclass proposal save for how the litigation of the conspiracy claims will now proceed. Dealing with these agent classes will provide the most efficient and fair adjudication of these claims because it will provide the needed flexibility of addressing the individual concerns regarding each agent while providing a forum for the numerous putative class members to seek redress. Also, this approach is most efficient given the court's familiarity with this case and the fact that extensive discovery has already begun. The court finds that while this action will be complex, it will not be unmanageable. However, the court will keep a watchful vigil to be sure that this action does not become unmanageable as the record becomes more developed.

The court does note that Agent Defendants make various other arguments as to why class certification is not superior in this case.[29] For example, Agent Defendants urge this court to consider other significant litigation and regulatory proceedings currently proceeding. The court is aware of the litigation in the Eastern District of New York, *Secretary of Labor v. Fidelity Group, Inc. et al.*, CV-98-7683, and has adequately addressed issues arising from that litigation up to this point. Further, the South Carolina Department of Insurance's current administrative proceeding, *In re Nat'l Ass'n of Business Owners and*

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[29] Many of these arguments track those made by TPCM and already dealt with by this court. Therefore, the court will only address those arguments which are distinct from the arguments made by TPCM.

Professionals, et al., No. 1997062-078-007-2-0 (S.C. Dept. of Ins. June 4, 1999), has no bearing at this point on this proceeding. Therefore, the existence of these proceedings does not militate against a finding of superiority in this action.[30]

IV. CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons that Plaintiffs' Motion for Class Certification is **CONDITIONALLY GRANTED** as modified by this Order. Specifically, the proposed class of all Plaintiffs for claims against TPCM is conditionally certified (excluding claims under the South Carolina Unfair Trade Practices Act). However, class-wide treatment of Plaintiffs' conspiracy claims against all Agent Defendants is denied. Instead, the court conditionally certifies Plaintiffs' proposed subclasses currently with representatives based on the Agent Defendants as individual classes for all Plaintiffs' claims (excluding claims under the South Carolina Unfair Trade Practices Act).

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[30] The court notes that Defendant Colonial Life & Accident Insurance, Defendant Barbara Scott, and Defendants Truett & Associates, Elmer Stone, H. Michael Thomas, and Richard Vann all filed separate responses to Plaintiffs' motion for class certification. After carefully reviewing these submissions, the court need not specifically address them because its analysis in this Order adequately addresses the issues raised in these submissions. The court does note that Colonial's arguments regarding its liability based on its agent's action are based on the merits, and the court will not entertain such a challenge in the context of a motion for class certification.

AND IT IS SO ORDERED.

/s/Patrick Michael Duffy
PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
September 25, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2419
CA-98-2659

MARY B. GUNNELLS; WILLIAM A. GUNNELLS; TELE TECH CORPORATION; CYNTHIA MULLINAX; W & W TRUCK AND TRACTOR COMPANY, INCORPORATED; JERRY FREEMAN; AAA TRANSMISSIONS, INCORPORATED; PAMELA B. ROBERTSON; AVIONICS/SEAONICS INTERNATIONAL, INCORPORATED; JAMES E. CASSLEMAN; LARRY STRICKLAND; BRENDA WORKMAN; HELEN CLARK; BOBBY F. BUCHANAN; JOANNE BUCHANAN; BRIAN HANSEN; JAMES E. WISE; JOHN N. STANLEY; DANIEL L. DRIGGERS; BRENDA VOWELS; DAVID J. VOWELS; LIVINGSTON AUTO PARTS, INCORPORATED; PHILIP LIVINGSTON; LUKES CYCLE SERVICES, INCORPORATED; JEFF LUCARELLI; HH MOORMAN & SONS; HAROLD MOORMAN; OAKLAND CLUB; MARK B. BUXTON; STYLON OF CHARLESTON; MARY PARKER; TERRY HENSLEY; EARL SINGLETARY; ORA SINGLETARY, individually and as representatives of all persons and entities similarly situated

Plaintiffs – Appellees

-v.

HEALTHPLAN SERVICES, INCORPORATED, individually and as successor in interest to Third Party Claims Management, Incorporated; THIRD PARTY CLAIMS MANAGEMENT, INCORPORATED

Defendants - Appellants

and

FIDELITY GROUP INC.; INTERNATIONAL WORKERS GUILD, INCORPORATED; NATIONAL ASSOCIATION OF BUSINESS OWNERS AND PROFESSIONALS; IWG HEALTH AND WELFARE FUND; FIDELITY CLAIMS MANAGEMENT, INCORPORATED; EXECUTIVE CONSULTANTS INSURANCE AGENCY; RAYMOND R. OLIVI; JOHN BRANHAM; STEVEN BROUGHTON; JOHN COLLINS; REX CULBERTSON; ROBERT DAVIES; RICHARD DEXTAZE; KENNETH EVERY ANDREWS; FRANKIE FORT; ROBERT GERMAN; GARY GEITLER; MELISSA GEITLER; MARTIN T. GEITLER; MICHAEL D. GEITLER; GEORGE GRADEK; HUBERT G. GREENE; PHILLIP S. HODGSEN; EARL ISABELL; STEPHEN LACY; FREDERICK MALONE; DAVID E. MARTIN; MICHAEL MASSEY; HENRY MERCHANT; TINA MESSINGER; MICHAEL R. REQUA; BRUCE ROWAN; PAMELA REGOPOULUS; BRUCE RYALS; BARBARA A. SCOTT; HENRY K. SKINNER, JR.; ELMER STONE; KENNETH R. TALLMADGE; LEE TAYLOR; MICHAEL THOMAS; SCOTT TODD; ARNOLD H. VALENTINE; RICHARD M. VANN;

LEWIS H. WADE; DAVID M. WHITE; HERBERT L. WILLIAMS; BEN L. WELLS; JACK E. WILSON, individually and in his representative capacity; ANCHOR INSURANCE AGENCY; BRANHAM AND GEITLER ASSOCIATES; DIVERSIFIED INSURANCE; LEGEND EQUITIES CORPORATION; FINANCIAL BENEFITS, INCORPORATED; THE TAYLOR AGENCY INCORPORATED; TRUETT AND ASSOCIATES; COLONIAL LIFE & ACCIDENT INSURANCE COMPANY, a UNUM Company; DWAYNE A. SAMUELS; EUGENE O. DUNCAN; DAVID SPOONER; CHARLES L. BRADLEY; TERRENCE E. RHUE; NOEL SHAW; PAUL D. ASKEW; PHILLIP STASHIN; KEN AVERIES

Defendants

No. 01-2420
CA-98-2659

MARY B. GUNNELLS; WILLIAM A. GUNNELLS; CYNTHIA MULLINAX; JERRY FREEMAN; PAMELA B. ROBERTSON; JAMES E. CASSLEMAN; LARRY STRICKLAND; BRENDA WORKMAN; HELEN CLARK; BOBBY F. BUCHANAN; JOANNE BUCHANAN; BRIAN HANSEN; JAMES E. WISE; JOHN H. STANLEY; DANIEL L. DRIGGERS; BRENDA VOWELS; DAVID J. VOWELS; PHILIP LIVINGSTON; JEFF LUCARELLI; HAROLD MOORMAN; MARK B. BUXTON; MARY PARKER; TERRY HENSLEY; EARL SINGLETARY; ORA SINGLETARY, individually and as representatives of all persons and entities similarly situated; W & W TRUCK AND TRACTOR COMPANY, INCORPORATED; LUKES CYCLE SERVICES, INCORPORATED; AAA TRANSMISSIONS, INCORPORATED; LIVINGSTON AUTO PARTS, INCORPORATED; HH MOORMAN & SONS; TELE TECH COMPANY, INCORPORATED; AVIONICS SEAONICS INTERNATIONAL, INCORPORATED; OAKLAND CLUB; STYLON OF CHARLESTON, entities similarly situated

Plaintiffs - Appellees

v.

MICHAEL R. REQUA; ARNOLD H. VALENTINE; FINANCIAL BENEFITS, INCORPORATED; LEWIS H. WADE; BRUCE RYALS; GEORGE GRADEK; TINA MESSINGER; KENNETH EVERY ANDREWS; RAYMOND R. OLIVI; EXECUTIVE CONSULTANTS INSURANCE AGENCY; MICHAEL MASSEY; ANCHOR INSURANCE AGENCY; JOHN COLLINS, individually and in their representative capacities

Defendants - Appellants

and

FRANKIE FORT; FIDELITY GROUP INC.; INTERNATIONAL WORKERS GUILD, INCORPORATED; NATIONAL ASSOCIATION OF BUSINESS OWNERS AND PROFESSIONALS; IWG HEALTH AND WELFARE FUND; FIDELITY

CLAIMS MANAGEMENT, INCORPORATED; JOHN BRANHAM; STEVEN BROUGHTON; REX CULBERTSON; ROBERT DAVIES; RICHARD DEXTAZE; ROBERT GERMAN; GARY GEITLER; MARTIN T. GEITLER; GARY GEITLER; MICHAEL D. GEITLER; HUBERT G. GREENE; PHILLIP S. HODGSEN; EARL ISABELL; STEPHEN LACY; FREDERICK MALONE; DAVID E. MARTIN; HENRY MERCHANT; BRUCE ROWAN; PAMELA REGOPOULUS; BARBARA A. SCOTT; HENRY K. SKINNER, JR.; ELMER STONE; KENNETH R. TALLMADGE; LEE TAYLOR; MICHAEL THOMAS; SCOTT TODD; RICHARD M. VANN; DAVID M. WHITE; HERBERT L. WILLIAMS; BEN L. WELLS; JACK E. WILSON; BRANHAM AND GEITLER ASSOCIATES; DIVERSIFIED INSURANCE; LEGEND EQUITIES CORPORATION; THE TAYLOR AGENCY, INCORPORATED; TRUETT AND ASSOCIATES; COLONIAL LIFE & ACCIDENT INSURANCE COMPANY, a UNUM Company; HEALTHPLAN SERVICES, INCORPORATED, individually and as successor in interest to Third Party Claims Management, Incorporated; THIRD PARTY CLAIMS MANAGEMENT, INCORPORATED; DWAYNE A. SAMUELS; EUGENE O. DUNCAN; DAVID SPOONER; CHARLES L. BRADLEY; TERRENCE E. RHUE; NOEL SHAW; PAUL D. ASKEW; PHILLIP STASHIN; KEN AVERIES, individually and in their representative capacities

Defendants

FILED: December 18, 2003
[ENTERED: DECEMBER 18, 2003]

On Petition for Rehearing and Rehearing En Banc

Appellants filed a petition for rehearing and rehearing en banc.

Judge Niemeyer voted to grant panel rehearing. Judges King and Motz voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judges Widener, Wilkinson, Niemeyer, Williams and Shedd voted to rehear the case en banc, and Judges Luttig, Michael, Motz, Traxler, King, Gregory and Duncan voted against rehearing en banc. Chief Judge Wilkins disqualified himself from all consideration of this case.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Motz for the Court.

For the Court,
/s/ Patricia S. Connor
CLERK

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the

difficulties likely to be encountered in the management of a class action.

(c) **Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.**

(1)

(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)

(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Settlement, Voluntary Dismissal, or Compromise.**

(1)

(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)

(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) **Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) **Class Counsel.**

(1) *Appointing Class Counsel.*

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) *Appointment Procedure.*

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) **Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

> (1) *Motion for Award of Attorney Fees.* A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) *Objections to Motion.* A class member, or a party from whom payment is sought, may object to the motion.
>
> (3) *Hearing and Findings.* The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).
>
> (4) *Reference to Special Master or Magistrate Judge.* The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

②

Supreme Court, U.S.
FILED
[illegible] 11 2004
OFFICE OF THE CLERK

No. 03-1282

IN THE

Supreme Court of the United States

HEALTHPLAN SERVICES, INC., *et al.*,

Petitioners,

v.

MARY B. GUNNELLS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit, by upholding the conditional certification of a class of negligence claims with a limited number of individual damages issues, properly applied Federal Rule of Civil Procedure 23 in light of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)?

2. Whether this case is an appropriate vehicle for addressing a split among two circuits when the outcome would be the same regardless of which approach ultimately is correct?

3. Whether, given the small number of circuit courts which have addressed the issue, the Court should allow the lower courts the opportunity to apply Rule 23 (c)(4)(A) under varying circumstances to help focus the issues presented by the alternative approaches?

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Respondents respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari in No. 03-1282.

According to petitioner, this case presents a question of the proper application of Rule 23 of the Federal Rules of Civil Procedure. The Fourth Circuit, per Motz, J., properly applied Rule 23 and avoided conflict between the Opinion below and any other circuit courts. The Fourth Circuit correctly held that the district court did not abuse its discretion in conditionally certifying the class against petitioner.

There are three reasons that the Fourth Circuit's Opinion is not suitable for this Court's review:

First, the Opinion below faithfully followed *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The Court should deny certiorari because the Fourth Circuit's interpretation of Rule 23 is demonstrably correct and in harmony with this Court's precedent.

Second, the Opinion below does not hinge on an interpretation of Rule 23 which materially conflicts with the interpretation of another circuit. Thus, this case is an exceptionally poor vehicle for resolving the conflict between the Ninth and Fifth Circuits' approaches to Rule 23. The holding by the Fourth Circuit does not turn on the alleged conflict; with the fact in this case, the same result would have been reached under both the Fifth Circuit's and the Ninth Circuit's analysis. Therefore, this is not a proper case to resolve any material conflict between the Fifth Circuit and the Ninth Circuit.

Third, the Court should deny review because the conflict among the lower courts with respect to the issues presented would benefit immensely from additional steeping. For example, petitioner identifies only the Fifth Circuit and the Ninth Circuit (joined by two district courts) as having taken different views. Additional time will help distill the issues and put the Court in a better position to address the underdeveloped conflict.

STATEMENT OF THE CASE

This Petition involves an interlocutory appeal of the conditional certification of a class action against petitioner, Third Party Claims Management, Inc. ("TPCM"), for breach of contract and negligence which caused or contributed to the collapse of a healthcare plan known as the "Fidelity Plan" (the "Plan").

TPCM contracted with the Plan to process medical claims. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 422 (4th Cir. 2003). The limited discovery completed reveals that TPCM failed to hire enough staff to timely process claims, did not have adequately trained employees, improperly lost and/or discarded claims, and generally breached its obligations. *Id.* "In May 1997, Fidelity *fired*[1]

---

[1] TPCM's assertion that the contract "ended" is inaccurate. Pet. at 5. TPCM misstates the facts when it asserts that after the contract "ended" that the Plan continued to operate "*for the next several years*." *Id.* (emphasis added). The original complaint was filed approximately twelve months after TPCM last processed claims related to the Plan. TPCM also falsely implies that it was not until after TPCM was fired that claims went unpaid. *Id.* TPCM was identified in discovery and was added when the complaint was amended. TPCM greatly overstates the lapse of time between its negligence and the problems experienced by the class.

TPCM for incompetence" because of the huge backlog of claims created by TPCM's failure to live up to its contract. *Id.* (emphasis added). After being fired, TPCM continued to be paid for processing claims and gathering together data to transfer to the new claims administrator. However, TPCM failed to transfer complete claims information in a timely manner to the new claims administrator. The suit giving rise to this appeal was filed in August 1998.[2] The U.S. Department of Labor shut the Plan down in January 1999.

"As to TPCM, [respondents] allege that [TPCM] mismanaged administration of the Plan, created a huge backlog of unpaid claims, did not timely transfer information, and made it impossible to forecast rate increases accurately, resulting in the Plan's collapse and failure to pay hundreds, if not thousands, of health care claims." *Gunnells*, 348 F.3d at 422. The Fourth Circuit correctly summarized the claims which were fleshed out during the limited discovery permitted: "that TPCM's mismanagement of claims contributed to the ultimate collapse of the Plan and so caused Plaintiffs' damage." *Id.* at 428. The Fourth Circuit recognized evidence in the record supporting Plaintiffs' allegations of negligence against TPCM.[3]

---

[2] Discovery has been limited to class certification issues. The district court conditionally certified only the negligence and contract claims against TPCM.

[3] Both the majority and the dissent discussed the wealth of evidence in the record supporting negligence claims against TPCM. *E.g.*, *Id.* at 412-22; 454-55. For example, the dissent stated:

> There is evidence in the record to support allegations that TPCM did a poor job of paying claims, sometimes

(Cont'd)

The class claims certified against TPCM involve:

> a single, straightforward cause of action consisting of three questions common to all Plaintiffs — whether "TPCM violated its duties . . . as third party administrator of the Plan," whether "such conduct was a cause of the Fidelity Plan's failure," and whether "that failure directly injured Plaintiffs and the absent class members." J.A. 1249. Neither of the first two questions require any individual inquiry, and the third question may require nothing

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(Cont'd)

> losing claims and other times adjusting or "adjudicating" claims that should not have been adjudicated. TPCM admits that it did not have a sufficient number of trained claims examiners to stay current with claims being filed, and, as a result, a backlog in claims processing developed that grew to six to eight months. Plan members began to complain widely of the delays in the processing of their claims.

Id. at 454. Petitioner argues that the Fourth Circuit's general references to "negligence" claims, rather than identifying a particular cause of action by name, is error. Pet. at 7; 9; 10; 12; 19. At this preliminary stage, Plaintiffs should not be penalized because the complaint has not been amended to clarify some negligence claims and breach of contract claims. Based upon the limited discovery allowed, the Fourth Circuit and the district court implicitly recognized that the broad causes of action alleged in the complaint will necessarily be narrowed and amended as discovery continues. The Fourth Circuit clearly certified the negligence claims and related contract claims. *E.g.*, *Gunnells*, 348 F.3d at 422 (describing causes of action alleged). To the extent necessary, the Complaint will be amended to reflect evidence gathered in discovery.

> more than a ministerial determination that can be made simply and quickly.

Id. at 445.[4]

Over two years ago, TPCM filed a lengthy Rule 23(f) petition, in excess of seventy pages, requesting the Fourth Circuit review the district court's decision to conditionally certify several classes. TPCM filed a two volume addendum consisting of thousands of pages of materials presented to the district court, including entire depositions. Additionally, several defendant agents who sold the Plan to members of the class filed a Rule 23(f) petition. Responses were filed with attachments. The panel held oral argument. The opinion and dissent span eighty-eight pages. The Fourth Circuit clearly addressed the weaknesses of TPCM's arguments raised in the Petition.

After reviewing the massive record, the Fourth Circuit concluded the class against TPCM "seems even better suited for class treatment than the diverse issues against many defendants involving the laws of a number of states that [the Fourth Circuit] certified in *Central Wesleyan*." 348 F.3d at 427 (citing *Central Wesleyan College v. W.R. Grace & Co.*,

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[4] The district court and the Fourth Circuit recognized that the calculation of unpaid bills is a ministerial, formulaic task which requires reviewing the Plan and determining the amount to be paid. Nonetheless, without citation to the record below, petitioner identifies seven excuses for its conduct. The excuses are nothing more than unsupported argument. Pet. at 13. Assuming, *arguendo*, that the excuses were fact, the damages calculations will still be made by a single expert witness. In fact, if the class is decertified, the same expert must appear in every case to explain the identical damages calculation methodology.

6 F.3d 177 (4th Cir. 1993)). The district court and the Fourth Circuit recognized that the unpaid medical claims are readily calculable through use of the computerized claims processing methods and formulas used by the Plan, that punitive damages would be calculated based on TPCM's conduct, and that only limited areas of individualized inquiry may be necessary. *E.g.*, *id.* at 429.[5] In considering the requirements of Rule 23, the Fourth Circuit found the common issues in the only viable claims against TPCM predominated over the limited potential issues requiring individual analysis. *Id.* at 429-30.[6] According to the Fourth Circuit, "*Central Wesleyan* virtually compels the conclusion that the district court did not abuse its discretion in conditionally certifying Plaintiffs' class against TPCM." *Id.* at 446.

After a request by TPCM, rehearing and rehearing *en banc* were denied.

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[5] The district court recognized the obvious when it comes to calculating compensatory damages in the form of unpaid claims: the calculation of medical bills to be paid under the Plan is a formulaic process, based on few variables. A single expert will be able to calculate what should have been paid under the Plan. The district court also noted that the court-appointed independent fiduciary already undertook this task using the Plan's parameters. *Gunnells*, 348 F.3d at 429. TPCM claims that "at least 1,400 mini trials must occur." Pet. at 13. While 1,400 such claims possibly *may* occur, it is unlikely as no individual case presented in South Carolina involving the Plan has presented such claims for damage to credit. The possibility that mini trials may occur does not diminish the huge benefit of handling the liability issues in a single trial, thereby avoiding the need for numerous juries to hear the same, repetitive testimony.

[6] The version of Rule 23 contained in the Appendix (pages 177a to 187a) to the Petition is not the version which was considered below.

REASONS FOR DENYING THE PETITION

A. The Fourth Circuit Carefully Considered *Amchem* And *Ortiz* And Properly Upheld Class Certification.

The Court should deny the Petition because the Fourth Circuit correctly applied Rule 23 to the circumstances of this case to uphold the district court's certification of the class. TPCM fails to identify a material conflict between the Opinion below and *Amchem*. The Fourth Circuit respected all parts of Rule 23 and does not, contrary to petitioner's allegations, render any part of the rule superfluous.[7] Rather, it is the position advanced by petitioner which would create a conflict with this Court's opinions in *Amchem* and *Ortiz*.

The Fourth Circuit clearly considered and respected the Court's guidance as set forth in *Amchem* and *Ortiz*.[8] The Fourth Circuit devoted many pages of analysis to *Amchem*, *Ortiz*, and their progeny.[9] Contrary to petitioner's argument, nothing in the Fourth Circuit's Opinion would permit a court to certify any issue under the rubric of Rule 23(c) for class treatment without conducting a predominance inquiry. Pet. at 3.

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[7] The Federal Rules of Civil Procedure were adopted by order of the Court in 1937. Although Congress delegated this authority to the Supreme Court through the Rules Enabling Act of 1934, the content of the Rules was formed entirely by the Court. Wright & Miller, Federal Practice and Procedure: Civil 4th ed. § 1001. Thus, petitioner's concerns about whether the Opinion below "wholly discarded" the direction of the United States Congress, Pet. at 2, or "circumvented Congressional intent." Pet. at 3, are unfounded.

[8] As *Amchem* does not even mention Rule 23(c)(4), it is unclear what conflict petitioner alleges exists between the Fourth Circuit opinion and *Amchem*. Significantly, TPCM fails to explain how the Fourth Circuit's discussion of *Ortiz*, a more recent case interpreting *Amchem* and discussing Rule 23(c)(4), is not persuasive.

[9] For example, the Fourth Circuit acknowledged that under *Amchem*, settlement is relevant and must, therefore, affect the (Cont'd)

After thoughtfully reviewing the district court's Rule 23 analysis, the Fourth Circuit found that "[s]uch care [by the district court] reflects assiduous respect for Rule 23's requirements, not an abuse of discretion." *Gunnells*, 348 F.3d at 430. It is the position adopted by petitioner which runs afoul of the Court's interpretation of Rule 23(c)(4) as set forth in *Ortiz*. *See Gunnells*, 348 F.3d at 440-41 (stating that the dissent's position "fails to take into account the Supreme Court's own characterization and application of *Amchem* in *Ortiz*.").[10] Surprisingly, even after failing to obtain rehearing, petitioner does not address *Ortiz*.

(Cont'd)
predominance inquiry because manageability concerns are reduced in a settlement context. Based on this undeniable point, TPCM inexplicacably argues that the Fourth Circuit "relied on *Amchem* for the direct proposition that was rejected in *Amchem*". Pet. at 15.

[10] The Fourth Circuit correctly described the subsections of Rule 23 as "interactive." The Fourth Circuit also recognized what petitioner fails to see: the facts in *Amchem* are vastly different than in this case. In *Amchem*, the common facts were that the "class members' share exposure to asbestos" which did not meet the predominance requirement given the different types of products, which release differing amounts of asbestos, caused different diseases, the different exposures (products, duration, and conditions), and other factors. *Ortiz*, 527 U.S. at 832 n.12. In this case, the class members (all from South Carolina) were covered by the same Plan, have the same type of injury (unpaid bills) caused by the failure of the Plan, and the class members' injuries were caused by the same negligence of the petitioner.

As the Fourth Circuit points out, the Court made clear that Rule 23(c)(4) should be used to allow class treatment of particular claims in order to accomplish the laudable goals of Rule 23. *Gunnells*, 348 F.3d at 440 (citing *Ortiz*, 527 U.S. at 856). The Fourth Circuit's position is supported by the plain text of Rule 23(c)(4), which provides that the district court may separate specific claims and then perform its analysis under Rule 23(a) and (b).[11] Further, the Advisory Committee's note on Rule 23(c)(4) explains:

> This provision recognizes that an action may be maintained as a class for particular issues only.

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[11] The Fourth Circuit aptly described the problems with the argument made by the dissent and adopted by TPCM:

> First, the dissent's rigidly sequential approach ignores the plain language of the rule. Rule 23(c)(4) provides that:
>
> > *[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues*, or (B) a class may be divided into subclasses and each subclass treated as a class, *and the provisions of this rule shall then be* construed and *applied* accordingly.
>
> Fed. R. Civ. P. 23(c)(4) (emphasis added). Thus, Rule 23 specifically dictates that "[w]hen appropriate" a class action may be "maintained" as to "particular issues" and, *after* that is done, "the provisions of this rule," such as the predominance requirement of (b)(3), "shall *then* . . . be construed and applied." *Id.* (emphasis added). The dissent's approach — that a court first determine "that the *action* as [a] whole satisfies the predominance

(Cont'd)

> For example, in a fraud or similar case, the action may maintain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

This case is just like the fraud example approved by the Advisory Committee: the district court certified the only claims in the underlying complaint which apply to TPCM – the negligence claims – while recognizing that a small portion of the damages issues *might* require individual inquiry.[12]

In analyzing the district court's opinion, the Fourth Circuit reviewed the Rule 23(a) prerequisites and found the single certified class satisfied the numerosity, commonality, typicality, and adequacy requirements. *Gunnells*, 348 F.3d at 425. Next, the Fourth Circuit correctly reviewed the certification order, pursuant to Rule 23(b)(3), to determine

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(Cont'd)

> and superiority requirements imposed by 23(b)(3)" and only then employ subsection 23(c)(4), [*Gunnells*, 348 F.3d at 453], simply ignores Rule 23(c)(4)'s express command.

Gunnells, 348 F.3d at 439.

[12] This interlocutory appeal was accepted by the Fourth Circuit before merits discovery occurred. However, based on the limited class-related discovery, Plaintiffs recognized that only limited causes of action were appropriate against TPCM and "made abundantly clear" that they do not seek certification on any "direct" liability claims for failure to adjudicate any particular medical claims. *Id.* at 431. Respondents, to the extent necessary, expect to amend their complaint against TPCM after merits discovery on remand.

whether the common issues of law or fact predominated over necessary individual inquiry such that a class action would be superior to individual actions. *Id.* at 425-33. The Fourth Circuit stated:

> [T]he district court carefully considered the requirements of Rule 23(a) and (b)(3) and made specific and detailed findings as to compliance with those requirements. In doing so, the court followed the admonition in *A. H. Robins*, 880 F.2d at 740, to "take full advantage of the provision in [Rule 23(c)(4)] permitting class treatment of separate issues . . . to reduce the range of disputed issues" in complex litigation, and most especially the teachings of *Central Wesleyan* itself, and then exercised its discretion to grant conditional class certification.

Id. at 426.

The Fourth Circuit recognized that class treatment of the claim against TPCM served the purposes behind Rule 23. Class treatment would provide access to the courts for those claims that would be "uneconomical if brought in an individual action" and would reduce litigation costs by avoiding "enormous redundancy of effort, including duplicative discovery, testimony by the same witnesses in potentially hundreds of actions, and re-litigation of many similar, and even identical, legal issues." *Id.* at 426. The common and identical issues are the majority of the proof in all class members' claims. Class treatment also conserves important judicial resources by reducing the number of trials and the total amount of court time devoted to resolving the claims. *Id.* at 426-27.

The Fourth Circuit properly applied Rule 23(c) in light of *Ortiz*, parsing out the negligence-based claims for analysis under Rule 23(a) and (b). Applying common sense to the rule and the facts, the Fourth Circuit found that the district court had not abused its discretion in conditionally certifying the class.[13]

While petitioner champions the position that the Fourth Circuit analyzed only the limited discrete *issues* certified to see if it met Rule 23's requirements, it is clear that the majority considered the "*claims* against TPCM *as a whole*." *Id.* at 429 (first emphasis added). The Fourth Circuit reviewed the district court's order and concluded that the class against TPCM "seems even better suited for class treatment than the diverse issues against many defendants involving the laws of a number of states that [the Court] certified in *Central Wesleyan*." *Id.* at 427 (citing *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993)).[14] The Court should deny certiorari because the

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[13] Using the same analysis, the Fourth Circuit also reversed the district court's certification of several agent subclasses, clearly vitiating the dissent's claim that the majority opinion would allow courts to look at common issues through a "pinhole" and ignore all other issues. *Gunnells*, 348 F.3d at 451.

[14] TPCM raises several issues to support its argument that "the decision below is incorrect." Pet. at 23-26. TPCM's claim that the class will require 1,400 trials involving liability, comparative fault and damages is wrong.

While a subset of the class may wish to present individual damage issues, TPCM's comparative fault argument evidences a clear misunderstanding of the claims against TPCM. TPCM is liable for its own breaches of duty; TPCM cites no evidence which supports a

(Cont'd)

Fourth Circuit's opinion properly interpreted Rule 23(c)(4)(A) in light of *Amchem* and *Ortiz.*

B. This Case Is Not A Good Vehicle For Resolving The Alleged Split Between The Fifth And Ninth Circuit Because The Opinion Below Does Not Turn On A Disputed Interpretation Of Rule 23(c)(4)(A).

While there is undeniably a split amongst the Fifth and Ninth Circuits on how to apply Rule 23(b)(3) in the case of a limited issues class under Rule 23(c)(4)(A), this case is a poor choice to address the split because the outcome would be the same under either approach. TPCM's claim that the Fourth Circuit's Opinion conflicts with *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) and other Fifth Circuit precedent is "confounding," to say the least, because those cases support the Fourth Circuit's opinion. *Gunnells*, 348 F.3d at 444. The Fourth Circuit explained that:

> the Fifth Circuit cases [cited by TPCM and the dissent] do not state, let alone hold, as the dissent would, that "the entire action," or "the action as a whole" — *i.e.*, all causes of action against all parties — must satisfy Rule 23(b)(3)'s

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(Cont'd)

finding that any class member was comparatively negligent. Respondents have made clear they are not claiming that TPCM improperly decided a particular claim. *Gunnells*, 348 F.3d at 431. Rather, respondents' claim is that TPCM's systematic failure caused the collapse of the Plan. The "comparative fault" issues raised by TPCM would only come into play if respondents were making direct claims. Pet. at 13.

The Fourth Circuit thoroughly addressed the superiority and manageability issues. *See e.g., Gunnells*, 348 F.3d at 426-27. The Fourth Circuit's decision is correct.

> predominance requirement before a court can employ Rule 23(c)(4) to certify a class. Rather, the Fifth Circuit cases merely require that "*a cause of action, as a whole,* must satisfy rule 23(b)(3)'s predominance requirement" before "rule 23(c)(4) is available."

Id. (citing *Smith v. Texaco, Inc.* 263 F. 3d 394, 409 (5th Cir. 2001), dismissed *sub nom* pursuant to settlement after court had requested response to petition for rehearing *en banc*, 281 F.3d 477 (5th Cir. 2002)); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998); and *Castano*, 84 F.3d at 745 n.21. TPCM's proposed interpretation of *Castano* and its progeny is inconsistent with the Fifth Circuit's own analysis; there is no conflict between the Fourth Circuit's opinion and Fifth Circuit precedent. The Fourth Circuit, like the Fifth Circuit in *Allison,* looked at the claims as a whole.[15]

Furthermore, as the Fourth Circuit explained, it saw no reason to enter the "fray"[16] between the Fifth Circuit and the Ninth Circuit, because:

> Plaintiffs' *cause of action* as a whole against TPCM satisfies the predominance requirements

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[15] Petitioner argues that the Ninth Circuit takes a "liberal" approach to class certification. Pet. at 19. This argument is apparently raised because the Ninth Circuit was unwilling to "close the door on class action litigation in products liability cases." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). While it is debatable that the Ninth Circuit's approach is "liberal," it is clear that the Fourth Circuit did not take a liberal approach. In fact, the Fourth Circuit took a similar approach to that of the *Allison* court. *Gunnells*, 348 F.3d at 442 (finding that *Allison* analyzed the cause of action as a whole).

[16] As the Fourth Circuit explained, a split of the circuits already exists as to how Rule 23(c)(4) should be interpreted. The Ninth Circuit (Cont'd)

> of Rule 23. Thus even if the view adopted by the Fifth Circuit (that predominance must be established within a given cause of action to invoke (c)(4)) rather than that of the Ninth Circuit (that this is not necessarily required) constituted the law of this circuit, our holding here would be in full accordance with the Fifth Circuit view.

Gunnells, 348 F.3d at 444-45. Thus, having looked at all the evidence in the record below, the Fourth Circuit found that the outcome would be the same under either circuit's approach.

The position advocated by petitioner is not supported by the text of Rule 23 and this Court's guidance in *Amchem* and *Ortiz*. Indeed, all reported cases found discussing Rule 23(c)(4) rejected the interpretation TPCM urges the Court

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(Cont'd)
has adopted the more flexible approach set forth in *Valentino*, 97 F.3d at 1234, while the Fifth Circuit has adopted a more strict application of Rule 23 (c)(4). *E.g.*, *Allison*, 151 F. 3d at 421.

TPCM also suggests a circuit split exists about how Rule 23(c)(4) can be squared with the Seventh Amendment, arguing that the Ninth Circuit "expressly disavowed" the position taken by the Fifth Circuit. Pet. at 21. However, careful review of the *Valentino* decision reveals that the Ninth Circuit merely did "not accept" the position adopted by the Seventh Circuit in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) because the Constitutional concern "may" not be in line with Ninth Circuit precedent and was "never squarely presented to the district court." *Valentino*, 97 F.3d at 1232. Similarly, the Seventh Amendment concern raised here was not squarely presented in this Court, in the Fourth Circuit, or in the district court.

to consider.[17] To avoid a circuit conflict, the Court should deny the Petition for Writ of Certiorari.

Even if the Court were to find that the Fourth Circuit should have applied the Fifth Circuit's approach, the correct result would have been the same. Here the differing approaches to Rule 23(c)(4)(A) would yield the identical conclusion. Certiorari should be denied because this case does not provide a means of exposing the disadvantages of the conflicting approaches to Rule 23.

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[17] Neither the Fourth Circuit nor Plaintiffs' counsel is aware of any "decision by any court that has adopted the view that in . . . cases . . . involving more than one cause of action [that] a court must evaluate predominance in the context of the 'action taken as a whole' or the 'case as a whole.'" *Gunnells*, 348 F.3d at 445 (internal citations omitted). Even those cases cited by TPCM support the majority opinion. It is TPCM's position which conflicts with the other courts which considered this issue. The following cases contradict the interpretation of Rule 23(c)(4) espoused by TPCM here: *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 38-43 (1st Cir. 2003); *Piazza v. EBSCO Industries, Inc.*, 273 F.3d 1341, 1349, 1351-53 (11th Cir. 2001); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 154 (2d Cir. 2001); *Becherer v. Merrill Lynch*, 193 F.3d 415, 430 (6th Cir. 1999) (*en banc*) (Moore, J., concurring in the judgment); *Allison*, 151 F.3d at 421-22; *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 453 (3d Cir. 1977); *Geraghty v. United States Parole Comm'n*, 579 F.2d 238, 252-53 (3d Cir. 1978), *vacated on other grounds*, 445 U.S. 388, 402-03 (1980); *Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 544 (D. N.J. 1999); *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279, 289 & n.4, 295 (D. N.J. 1997); *Hudson v. Capital Mgmt. Int'l, Inc.*, 565 F. Supp. 615, 630-31 (N.D. Cal. 1983); *Lewis v. Capital Mortgage Invs.*, 78 F.R.D. 295, 307 (D. Md. 1978); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561 (S.D. Fl. 1973).

C. The Issues Raised By the Split Between the Fifth and Ninth Circuit Should Steep Further in the Lower Courts.

The split between the Fifth Circuit and the Ninth Circuit on how to approach the interplay between Rule 23(b)(3) and Rule 23(c)(4)(A) has received little attention in the lower courts. Petitioner argues that the split is recurring and needs this Court's immediate attention. Pet. at 19. However, careful consideration of the cases cited to the Court reveals that only the Fifth and Ninth Circuits (followed by two district courts, *Emig v. Am. Tobacco. Co.*, 184 F.R.D. 379 (D. Kan. 1998) and *In re Tetracycline Cases*, 107 F.R.D. 719 (W.D. Mo. 1985)) have reached the issue. Pet. at 20.

Petitioner erroneously cites a third district court, *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (D. Fla. 2001), as having taken a different approach. *Id.* However, like the Fourth Circuit below, the *Rink* court found "it unnecessary to render an opinion or recommendation on which is the correct view of the proper interplay between these provisions of the rule." *Id.* at 670 (noting that the court tended to agree with the Ninth Circuit's approach).

Additional time to allow the application of Rule 23(c)(4)(A) to new fact patterns will help distill the issues and put the Court in a better position to address how to resolve the underdeveloped conflict. Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The Fourth Circuit analyzed the facts, Rule 23 and the case law and correctly concluded that the district court did not abuse its discretion in conditionally certifying a class against TPCM. The Opinion below is well reasoned and follows this Court's law.

Respectfully submitted,

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IN THE
Supreme Court of the United States

HEALTH PLAN SERVICES, INCORPORATED,
individually and as successor in interest to Third
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Petitioners,
v.
MARY B. GUNNELLS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I. THIS CASE PRESENTS THE PRIME VEHICLE FOR THE COURT'S RESOLUTION OF THE CIRCUIT CONFLICT REGARDING THE APPLICATION OF THE PREDOMINANCE REQUIREMENT IN RULE 23(B)(3) IN THE CONTEXT OF RULE 23(c)(4)(A).

As even Respondents recognize in their brief to this Court, there is "undeniably" a split between the Fifth and Ninth Circuits regarding the application of Rule 23(b)(3) in the context of Rule 23(c)(4). (Br. in Opp. 13) When the Fourth Circuit determined that the common issues pursuant to (c)(4) could be severed *before* undertaking the predominance analysis required by (b)(3), the Fourth Circuit emerged directly in the midst of this conflict, further deepening the circuit split. The Fourth Circuit's and Respondents' contention to the contrary is flatly wrong. Class certification in this case could not be maintained if the predominance inquiry employed by the Fifth Circuit had been followed. As a result, this case presents the optimal vehicle for this Court to resolve this immensely important issue.

The dissent below, the United States Chamber of Commerce, the National Home Equity Mortgage Association and Petitioner have all demonstrated unequivocally in an opinion and prior briefings to this Court that the Fourth Circuit majority's opinion directly conflicts with prior decisions of this Court and the Fifth Circuit on this issue with great social and economic consequences.[1] The Fifth Circuit has unambiguously rejected an issue by issue predominance analysis, as undertaken by the Fourth Circuit, in favor of a predominance inquiry into an action "as a whole." *Castano v. Am. Tobacco Co.*, 84 F.3d 734,745 n.21 (5th Cir. 1996). The Fourth Circuit's artificial search for predominance *after* severing the uncommon issues is precisely the "nimble use" of Rule 23(c)(4) that *Castano* struck down. *Id.*

The Fourth Circuit readily admitted that it hand picked what it believed to be common issues pursuant to (c)(4), *then* conducted a predominance inquiry. The Fifth Circuit requires the predominance analysis to be anchored to an action "as a whole," uncommon and common issues *included*. *Id.* at 745 n.21. However, by severing the individual issues first, the "whole" action, under any theory of an action, simply cannot be analyzed as the only issues remaining for review are the common ones. The Fourth Circuit ensured "that the predominance of a selected issue is a foregone conclusion, since the common question of law or fact would always predominate over the individual issues that are not a factor." (App. at 82a)

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[1] Petitioner's Brief at 17-21; Appendix to Petition for Writ of Certiorari ("App.") at 71a; Brief of Amicus Curiae Chamber of Commerce of the United States at 1, 4, 7, 9; Brief of Amicus Curiae National Home Equity Mortgage Association at 1-3.

Respondents' and the Fourth Circuit's claims that the opinion on appeal is not in conflict with the Fifth Circuit is a thin attempt to disguise the obvious analysis and finding to the contrary. There can be no doubt that the Fourth Circuit has followed the Ninth Circuit's liberal interpretation of Rule 23. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996)(even where predominance is not found, a court may isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these issues). As the Chamber of Commerce correctly argues, "[w]ith its holding that the predominance requirement need not be satisfied at the threshold, the Fourth Circuit has stepped foursquare into the conflict" between the Fifth and Ninth Circuits. (Br. Chamber of Commerce at 7)

The Fourth Circuit further advances its misapplication of the Fifth Circuit's cases by invoking a confusing use of the words "cause of action." The Fourth Circuit affirmed certification of the general question: whether TPCM violated certain duties, causing the Plan's failure and directly injuring the plaintiffs. The Fourth Circuit then characterized this question as one "cause of action," declared that its action "predominate[s] over the individual issues involved *in that cause of action*." (App. at 61a n.16) Respondents ignore, as did the Fourth Circuit, the fact that this "cause of action" is actually an amalgam of highly individualized claims that will require an individual inquiry into causation, liability and damages. Significantly, this suspect "cause of action" does not include any of the seven claims actually pled by Respondents.

The Fourth Circuit's argument as to what constitutes a "cause of action" in this lawsuit is a red herring. There is *no* cause of action, under any definition, in the instant case where the certified question predominates. Respondents sidestep this issue in their brief by attempting to conveniently collapse the requirements of predominance and superiority into a singular test, asserting merely that the class action tool is a superior method of adjudicating the certified question. Respondents cannot represent to this Court that the proper predominance inquiry was undertaken by the Fourth Circuit, which would have called for comparing the now certified singular question to the numerous individual questions relating to both liability and damages.

Respondents have now promised to amend their complaint (for what would be the third time in this litigation) to fit more neatly within the cause of action articulated by the Fourth Circuit and dismiss the direct claims against TPCM, only pursuing the indirect claims. Respondents' promise to amend stops just short of admitting that the question certified does not relate back to any particular claim pled thus far. Such an amendment will not alleviate the impropriety of this class certification for the same reasons the Fourth Circuit's "cause of action" fails to pass the predominance test. At the heart of this lawsuit, whether couched in the Fourth Circuit's "cause of action" or the Respondents ever-changing theories of this case, are individual issues that Judge Niemeyer correctly observed clearly predominate over the issue certified by the Fourth Circuit, particularly with respect to individual issues of liability and damages.[2]

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[2] Petitioners contest Respondents' characterization of the facts, which Petitioners assert are misleading to this Court. As an example, even the district court recognized that a damages determination alone may not be ministerial and will require 1,400 mini-trials. (App. 152a-154a)

Ultimately, if the proper predominance analysis had been undertaken by the Fourth Circuit majority with respect to the entire lawsuit or with respect to any claim actually pled, no predominance would have been found. Without a proper predominance finding, this class cannot be maintained. Respondents' assertion that predominance exists under either the Ninth Circuit's or the Fifth Circuit's analysis simply endorses the Fourth Circuit's erroneous position that predominance was not, in fact, manufactured by the Fourth Circuit's improper "nimble" use of Rule 23(c)(4). The Fourth Circuit's attempt to liken its analysis to that of the Fifth Circuit rests on wordplay, not on a solid analysis supported by the actual claims and facts of this case. There can be no question that the Fourth Circuit has contributed significantly to a circuit split with the Fifth Circuit on this critical issue, which, as articulated by amici, involves widespread social and economic implications and an immediate severe impact on TPCM.

II. RESPONDENTS FAILED TO ADEQUATELY ADDRESS THIS COURT'S RECENT CLASS ACTION RULING REGARDING THE MANAGEABILITY TOOLS IN RULE 23.

In their response, Respondents gave passing reference to this Court's ruling in *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).[3] Yet they failed to address the central point of this Court's holding in that case: Even in the context of Rule 23(e), which allows settlement only classes, the predominance requirement *must* be met and deserves "undiluted, even heightened attention" when invoking the class action management devices set forth in Rule 23. Id. at 620, 623. As previously articulated to this Court, such is clearly analogous to an analysis under Rule 23(c)(4)(a), which, like Rule 23(e), is a class action management tool. (App. at 81a; Br. Chamber of Commerce at 9) In contravention of *Amchem*, Respondents now seek to have this Court sanction the Fourth Circuit majority's legitimization of an otherwise uncertifiable class in an effort to try to force Petitioners into settlement.

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[3] Respondents accuse Petitioners of ignoring *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), a case involving this Court's review of a certification of a settlement class under Rule 23(b)(1)(B). This Court held that certification of a mandatory settlement class on a limited fund theory requires a showing that the fund is limited independently of the agreement by the parties. Respondents have failed to articulate the relevance of *Ortiz* to the analysis in this case. The only tenet that appears relevant from *Ortiz* is this Court's reiteration that the "Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rules can ignore the Act's mandate that 'rules of procedure' shall not abridge,

CONCLUSION

The Fourth Circuit majority's ruling below undeniably forces this case into the arena of a very important conflict in the federal circuits. The ruling deepens the conflict and presents this Court the perfect opportunity to resolve the issue once and for all. By determining the predominance inquiry need not be undertaken prior to severing issues for an issue-only class, the Fourth and Ninth Circuits have impinged on fundamental fairness in their zeal to coerce settlement or attempt to promote the efficient disposition of cases. Ironically, as passionately stated by the dissent below, the Fourth Circuit majority's ruling does nothing to promote efficient disposition of this case. Additionally, since this case has been certified, Petitioners are under immense pressure to settle what they believe to be a very defendable case on the merits.[4]

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enlarge or modify and substantive right." *Ortiz*, 527 U.S. at 845. Petitioners assert that the current analysis used by the Fourth Circuit in the context of Rule 23(c)(4) plainly does abridge Petitioners' rights.

[4] While Petitioners do not believe this is the proper instance to delve into the merits of the case, Petitioners strenuously dispute the facts as set forth in Respondents' brief, facts notably in most instances without any support or reference. There is, in fact, a vast amount of evidence in the

The Fifth Circuit properly refused to allow cases in its circuit to fall under the siege of this blackmail. Had the Fourth Circuit and the district court in the instant case followed the Fifth Circuit, the analysis would have revealed a morass of highly individualized issues to prove liability alone that do not predominate under any theory or claim advanced by Respondents. As adeptly articulated by amici, the stakes are too high to allow this issue to simmer further. The instant case is the optimal vehicle for adjudicating this issue and granting Petitioners' request for certiorari.

Respectfully submitted,

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record to the contrary demonstrating the need for an individual analysis as to liability and damages, as recognized by the dissent.

MAY 1 1 2004

③

No. 03-1282

In the Supreme Court of the United States

HEALTHPLAN SERVICES, INC., ET AL.,

Petitioners,

v.

MARY B. GUNNELLS, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States (the Chamber) respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioners. The petitioners have consented to the filing of the brief, and their written consent has been filed with the Clerk; the respondent, however, has refused to consent to the filing of the Chamber's brief.

The Chamber is the world's largest business federation representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The rise of "issue classes" and the proper application of Federal Rule of Civil Procedure 23(c)(4)(A) is a matter of vital concern to the Chamber's members. An unduly expansive interpretation of Rule 23(c)(4)(A) permits the certification of classes that ought never to be certified. That, in turn, leads to unfairness and inefficiency, and it contributes to the phenomenon of "blackmail" litigation.

The decision below exemplifies this problem: Relying on Rule 23(c)(4)(A), the Fourth Circuit affirmed certification of a single question: whether the petitioner in this case was a cause of a purported ERISA plan's failure. The answer to that question will not resolve a single class member's case. In so doing, the majority below rejected Judge Niemeyer's argument in dissent that as a matter of law individual issues cannot be severed for class certification *prior to* a predominance inquiry under Rule 23(b)(3).

If courts can certify "issue classes" without regard to whether common issues predominate in the case as a whole, businesses will be subjected to a substantial increase in class-action certifications, and their ability to defend themselves efficiently – or even effectively – will be compromised. Accordingly, the Chamber has a strong interest in encouraging this Court to review, and reverse, the decision below.

For the foregoing reasons, the motion of the Chamber of Commerce of the United States to file the accompanying brief as *amicus curiae* in support of Petitioners should be granted.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

The interest of the *amicus curiae* is described in the preceding motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The proper role of Federal Rule of Civil Procedure 23(c)(4)(A) is arguably the most significant and disputed question pertaining to class actions today. It has divided courts and scholars alike, and its resolution regularly determines whether huge lawsuits stand or fall. Now is the time for this Court to resolve this pressing issue, and this is the case by which to do so.

The question presented is unusually stark and clear: Does Rule 23(c)(4)(A) permit the certification of an "issue class" in a case that would not otherwise satisfy the predominance requirement of Rule 23(b)? Put another way, is Rule 23(c)(4)(A) a mere "housekeeping" provision, or is it an independent source of certification authority? The Fifth, and, at least implicitly, the Seventh Circuits have said that it is the former.[2] The Ninth and now the Fourth Circuits say it is the latter.[3] The Second Circuit has noted but not yet taken a side in the split.[4] The district courts are all over the map.[5] Academia is divided, as well.[6]

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

[2] See *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 744-746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

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[3] See *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Gunnells* v. *Healthplan Services, Inc.*, 348 F.3d 417 (4th Cir. 2003).

[4] See *Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167 n.12 (2d Cir. 2001).

[5] See, *e.g.*, *Rink* v. *Cheminova, Inc.*, 203 F.R.D. 648, 669-670 (M.D. Fla. 2001) (noting that (c)(4)(A) is "less than clear" and that "courts are not in agreement on the relationship between" subsections (b)(3) and (c)(4)(A)); *Cohn* v. *Massachusetts Mutual Life Ins. Co.*, 189 F.R.D. 209, 217-218 (D. Conn. 1999) (adopting *Castano's* view of (c)(4)(A)); *Arch* v. *Am. Tobacco Co.*, 175 F.R.D. 469, 496 (E.D. Pa. 1997) ("Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues."); *Simon* v. *Philip Morris, Inc.*, 200 F.R.D. 21, 28-31 (E.D.N.Y. 2001) (adopting *Valentino*'s approach); *Emig* v. *Am. Tobacco Co.*, 184 F.R.D. 379, 394-395 (D. Kan. 1998) (expressly embracing *Valentino*'s approach to (c)(4)(A) as authorizing "certification even if common issues do not predominate" but declining to certify on other grounds); *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985) ("What defendants decry as a dilution of the predominance requirement, however, appears to this court to be precisely what Rule 23(c)(4)(A) allows in the interests of flexibility and economies of adjudication.").

[6] The two schools' analyses are perhaps best exemplified by a pair of recent law review articles. Compare Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 712 (2003) (arguing that "neither (c)(4)(A)'s text, its structural placement, nor its rulemaking history provide support for an adventurous interpretation of the provision," and concluding that the Rule "simply cannot authorize an issue class action end-run around the predominance requirement for class actions that otherwise would fail to satisfy that requirement") with Jon Romberg, *Half a Loaf Is*

The Chamber believes that only the limited, "housekeeping" interpretation can be squared with the text, structure, and history of Rule 23(c)(4)(A). Expansive, freestanding issue certification under the Rule, on the other hand, constitutes an improper end-run around Rule 23's vital predominance requirement – a requirement that serves as the main guarantor of efficiency and fairness in the class-action context. This protection is particularly important, given the increase in class-action litigation over the last decade. Either way, however, the question is of the utmost importance and persistence, making guidance from this Court not only appropriate, but essential.

ARGUMENT

A. This Case Implicates An Important, Recurring Question That Is The Subject Of A Persistent Division Of Authority.

Writing prior to the Fourth Circuit's decision in this case, a perceptive commentator noted that "there exists today a still quiet but increasingly pronounced split of authority as to the meaning of Rule 23(c)(4)(A). Such disuniformity and uncertainty should be cause for concern at the very least and, at worst, might well result in great mischief." Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) (hereafter, "Hines").

Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A), 2002 UTAH L. REV. 249, 263, 281 (arguing that issue certification "can fundamentally revamp the nature of class actions," and criticizing courts for "fail[ing] to grasp" the full meaning of (c)(4)(A), which allows resolution of common issues while permitting complicated individual issues to be "severed away cleanly and painlessly").

The split is now deeper, and is no longer "quiet," given the sharp exchange between Judge Niemeyer and the majority in this case (and the 7-5 division in the en-banc-rehearing vote below). The prospect of "great mischief", moreover, is exemplified not only by the result in this case, but by numerous others as well.

Rule 23(c)(4)(A) states, "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . . and the provisions of this rule shall then be construed and applied accordingly."

The Rule "fails to specify under which circumstances it might be 'appropriate' to invoke (c)(4)(A), leaving courts and commentators to continue to debate that very topic thirty-some years after its enactment." Hines at 717. The most significant aspect of this debate concerns whether the provision permits certification of classes when, for the case as a whole, the "predominance" requirement of Rule 23(b)(3) is not satisfied. A number of courts and academics have said that it does not. In *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), for example, the Fifth Circuit struck down the certification of an expansive issue class action. Rejecting the district court's issue-by-issue predominance analysis, the court held that severing common from individual issues via (c)(4)(A) "does not save the class action." The court explained that:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial. Reading rule 23(c)(4) as allowing a court to sever issues until the re-

> maining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

84 F.3d at 745 n.21 (citations omitted).[7]

On the other side of the fence are the courts and academics that advocate an expansive role for Rule 23(c)(4)(A). In *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996), for example, the Ninth Circuit held that "[e]ven if the common questions do not predominate over the individual questions," a district court is authorized "to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."[8] Similarly, the Wright & Miller treatise instructs that when a class action fails the b(3) predominance test, a court should still "consider the possibility of determining particular issues on a representative basis as permitted by Rule 23(c)(4)(A)." 7A Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1778 (2d ed. 1986). In that fashion, the Rule's use can "recast a non-predominating class action into one that may predominate for purposes of Rule 23(b)(3)." *Ibid.* (Internal quotation marks omitted.)[9] This approach relies on a strained reading of the text and history of Rule 23. It allows district courts to sidestep the procedural safeguards carefully built into Rule 23(b), cobbling together a "class" of plaintiffs with disparate interests, who cannot reliably be ensured of adequate representation at the class level.

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[7] See also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (issuing writ of mandamus decertifying a 23(c)(4)(A) "issue" class, noting that the district judge's "experiment with an innovative procedure for streamlining the adjudication of this 'mass tort,' * * * so far exceeds the permissible bounds of discretion in the management of federal litigation as to compel us to intervene and order decertification"); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 955 (1998) (noting that the predominance requirement "has generally been understood (and I think correctly) to override the possibility of certification of a class on particular issues under Rule 23(c)(4) unless those issues are found to 'predominate' over the individual issues in the case"); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1059 (1986) ("before a 'limited issue class' can be certified pursuant to subdivision (c)(4)(A), the lawsuit must be certified under a Rule 23(b) category. Thus, the mass-tort litigant cannot utilize Rule 23(c)(4)(A) to maintain a class action in circumstances that would otherwise not support certification of a class").

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[8] See also, *e.g.*, *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985), in which the court approved the broad reading of (c)(4)(A) and held that the effect of the provision "is to lessen * * * the importance of the predominance requirement."

[9] See also Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 230 (1998) (commending the use of issue class actions in mass tort cases); Elizabeth J. Cabraser, et al. New Issues and Key Rulings in the Certification, Trial, Settlement, and Appeal of Class Actions 16 (ABA CCLE Nat'l Inst. Oct. 19, 2001) (arguing that Rule 23(c)(4)(A) "seems poised for a renaissance"); Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 326 (1983) (Rule 23(c)(4)(A) has been "underutilized and overlooked."); Susan E. Abitanta, *Comment, Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 SW. L.J. 743, 752 (1982) (while Rule 23(c)(4)(A) originated as a "tool of economy [it] now serves as a means to establish predominance"); MANUAL FOR COMPLEX LITIGATION § 30.17 (3d ed. 1995) (embracing expansive reading of 23(c)(4)(A)); Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS §§ 4.23, 4.25 (3d ed. 1992) (same); Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action,* 14 REV. LITIG. 79, 83, 95-96 (1994) (same); Elizabeth J. Cabraser, Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication, 36 WAKE FOREST L. REV. 979 (2001) (same); Patrick Woolley, Mass Tort Litigation

With its holding that the predominance requirement need not be satisfied at the threshold, the Fourth Circuit has now stepped foursquare into the conflict. The panel majority held that "when appropriate a class action may be maintained as to particular issues and, *after* that is done, the provisions of [Rule 23], such as the predominance requirement of (b)(3) shall *then* * * * be construed and applied." *Gunnells*, 348 F.3d at 439 (emphasis in original; internal quotation marks omitted). That holding conflicts with the decision of the Fifth Circuit in *Castano* and aligns the Fourth Circuit with the Ninth Circuit in *Valentino*. The conflict – acknowledged by the Second Circuit in 2001 (see *Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)) – is now a significant one, and the Fourth Circuit's narrow rejection of rehearing en banc means that it cannot be expected to resolve itself.

The facts of this case vividly demonstrate why 23(c)(4)(A) "issue classes" are so problematic. The "issue" as to which the class was certified – whether the defendant's actions were a proximate cause of the plaintiffs' losses – is not dispositive of the majority of other issues necessary to resolve any individual plaintiff's claim. The Byzantine structure of this action only highlights the point: The court stripped away individualized questions of liability by certifying 24 subclasses in the first phase of the trial. A separate damages phase will occur later. It was only after removing

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and the Seventh Amendment Reexamination Clause, 83 IOWA L. REV. 499, 500, 501, 525, 536 (1998) (same).

individualized questions of *both* liability *and* damages that the court was finally able to identify a common issue. Class certification in this case – even when limited to one common issue – will not therefore make the ultimate adjudication any more efficient; it will simply place pressure on the defendant to settle the case before trial.

Responding to Judge Niemeyer's dissent, the majority below sought to argue that it was simply applying the predominance test at the "cause of action" level. See, e.g., *Gunnells* 348 F.3d at 441. That is a non sequitur. Even if Rule 23 permitted slicing-and-dicing among causes of action and it is not at all clear that it does there ***is*** no "cause of action" in this case that encompasses the issue certified, and the majority did not even try to identify one.

The conflict at issue is of great consequence.

> "District courts already have struggled to make sense of the split in authority on the viability of an issue class action 'alternative.' A number of courts have followed the narrow view of (c)(4)(A) asserted in *Castano*, rejecting plaintiff proposals to certify expansive issue class actions without regard to predominance of the whole case. But an equal number of district courts follow the more expansive approach to (c)(4)(A) offered in *Tetracycline* and *Valentino*, even while some have concluded (as did the court in *Tetracycline*), that the proposed class could not be certified even under a less demanding standard."

Hines at 746-747. The important, recurring question presented by the petition is the subject of a persistent split of authority that calls out for resolution by this Court.[10]

B. Rule 23(c)(4)(A) Does Not Permit Certification Of Issue Classes In Cases That Do Not Otherwise Meet Rule 23(b)'s Predominance Requirement

The circuits, including the Fourth Circuit, that have eschewed a threshold predominance requirement are wrong. Their analysis cannot be squared with the text, structure, and history of the class-action rules. Moreover, their expansive approach to issue certification is inconsistent with this Court's decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997).

Under the expansive interpretation of Rule 23(c)(4)(A), issue class actions will satisfy the (b)(3) predominance requirement simply by definition, because non-predominating questions will have been sliced away. But there is no indication that the framers of the Rules intended so sweeping a role for the provision. Quite the contrary: The 1966 Advisory Committee Note to Rule 23 devotes just two sentences to Rule 23(c)(4)(A). The example given a fraud case in which liability is determined in a class action but damages are individually adjudicated indicates a far narrower anticipated use of the provision.

The placement of the provision is significant, as well. Subdivision (c) of Rule 23 includes a variety of class action management provisions, addressing the timing of a class action order,[11] the need to provide notice to members of a (b)(3) class action and the content of such notice,[12] the binding effect of any judgment that might result from the certified class action,[13] and the procedure by which a court may divide a certified class action into subclasses.[14] It also includes Rule 23(c)(4)(A).

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[10] The consequences of the split are wide-ranging, even outside the federal system: Rule 23 is "the most prevalent model for state [class action] rules," and many states look to federal-court interpretations of Rule 23 to guide their own practice. See Herbert B. Newberg & Alba Conte, Newberg on Class Actions 13:1 (4th ed. 2002).

> "[S]ome conclusions may be drawn from (c)(4)(A)'s position within the structure of Rule 23 as a whole. Its placement in subdivision (c), for example, reflects a managerial rather than a primary role for (c)(4)(A). * * * None of the other subdivision (c) provisions alter the terms under which a (b) class action may be certified, or provide independent authority to certify another type of class action."

Hines at 718-719. Finally, as Judge Niemeyer concisely explained, "[i]n failing to examine the various other issues presented in the entire action to determine whether the required 'cohesiveness' is present to 'legitimize[] representative action in the first place' – as mandated by 23(b)(3), *see Amchem*, 521 U.S. at 623 – and by jumping to 23(c)(4), the majority * * * bypasses one of the most essential and most important checks imposed by Rule 23 on certifying Rule 23(b)(3) classes." *Gunnells*, 348 F.3d at 452 (Niemeyer, J., concurring in part and dissenting in part).

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[11] Fed. R. Civ. P. 23(c)(1).

[12] Fed. R. Civ. P. 23(c)(2).

[13] Fed. R. Civ. P. 23(c)(3).

[14] Fed. R. Civ. P. 23(c)(4)(B).

Because the expansive interpretation of Rule 23(c)(4)(A) cannot be reconciled with the Rule itself and the decisions of this Court, the petition should be granted.

C. Expansive Issue Certification Contributes To The Problem Of "Blackmail" Litigation.

The Fourth and Ninth Circuits' approach to Rule 23(c)(4) represents a significant liberalization of the requirements for class certification. Its inevitably increases defendants' exposure to the uncertainties and high stakes that accompany class certification.

That is extremely problematic, because class actions seeking massive damages are often trial-proof. If they survive dismissal, the bet-the-company risks to a defendant of a jury trial in large class actions are so enormous that even weak cases are usually settled. See Thomas Willging et al., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 184 table 40 (Federal Judicial Center 1996); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995) (noting that the costs and risks of trial induce settlement of more than 95% of all civil claims). However meritless a company may judge the claim, defendants typically cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995). This phenomenon of "blackmail settlements" "induced by a small probability of an immense judgment" is universally acknowledged to occur and to be a serious problem with the class action device. Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973); *Rhone-Poulenc*, 51 F.3d at 1298; see, *e.g.*, Fed. R. Civ. P. 23(f), 1998 Committee Note ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001). Even obviously frivolous filings are often settled, simply because they are "as costly to litigate as legitimate claims." *Developments in the Law – The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1812 (2000). See also H.R. CONF. REP. No. 104-369, at 32 (1995) (explicitly noting the high incidence of frivolous securities filings as a justification for the passage of the Private Securities Litigation Reform Act ["PSLRA"]).

As numerous courts and commentators have pointed out, the prevalence of "blackmail settlements" has tainted the reputation of large class action lawsuits, which are viewed with a jaundiced eye by the public and the business community. See, *e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371-372 (2000) ("Correspondingly, where the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest."); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1775 (1997) ("More practically, from the defendants' perspective, class actions are the ultimate weapon of legal terrorism, launched by litigation-mad, bottom-feeding, money-hungry, professional plaintiffs' lawyers."); James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021

(1995) ("Rather than creating the appearance of a public confession of guilt, which might deliver a lesson in morality, settlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.").

Liberalization of the requirements for class certification would have distinctly negative consequences not only for defendants, but for the integrity of our judicial system as a whole. For that reason, certiorari should be granted, and the expansive approach to issue certification endorsed by the Fourth and Ninth Circuits should be rejected by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 03-1282

In The Supreme Court of the United States

HEALTHPLAN SERVICES, INCORPORATED,
individually and as successor in interest to
Third Party Claims Management Incorporated, and
THIRD PARTY CLAIMS MANAGEMENT, INCORPORATED,

Petitioners,

v.

MARY B. GUNNELLS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NATIONAL HOME EQUITY MORTGAGE ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Home Equity Mortgage Association ("NHEMA") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of counsel for the petitioner has been obtained and that consent has been lodged with the Clerk. The consent of counsel for the respondent was requested but not obtained.

NHEMA is a national trade association whose members are home mortgage lenders or institutions and companies involved in mortgage lending. NHEMA's members have a strong interest in the proper interpretation and application of rules concerning class action litigation, as these companies are frequent targets of class suits. NHEMA has particularized insights into the practical ways in which the decision below will act to unfairly force settlements of even unmeritorious claims contrary to the purpose of Rule 23(f), F.R.Civ.P. and the holding of this Court in Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

WHERFORE NHEMA respectfully requests that the Court grant leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari.

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Interest of Amicus Curiae

The National Home Equity Mortgage Association ("NHEMA") is a national trade association whose members are home mortgage lenders or institutions and companies involved in mortgage lending. NHEMA's members have a strong interest in the proper interpretation and application of rules concerning class action litigation, as these companies are frequent targets of class suits. NHEMA urges the Court to grant the petition for writ of *certiorari* because the majority opinion below is doctrinally unsound and is in conflict with other circuit authority and contrary to prior controlling decisions of this Court in ways that radically upset settled expectations concerning which cases are susceptible to class treatment.[1]

Argument

1. The Panel Majority Has Misapplied Rule 23(c)(4)(A) in a Way Which Creates an Irreconcilable Conflict With the Fifth Circuit.

The majority's reading of Rule 23(c)(4) as permitting the certification of parts of a claim even though they do not predominate in the case as a whole erects an edifice built wholly on the sands of *dicta*. The dissent notes that the majority's position is based on "some district court opinions, commentaries, and a student note that, citing one another, argue in favor of the majority's interpretation." Pet. App. 87a.

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[1] No counsel for a party authored this brief in whole or part and no person or entity other than the *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation of this brief.

The majority opinion starts with In re A.H. Robins, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), citing the case as precedent. But both cited portions of A.H. Robins come not from any holding in the case, but from the court's extended discussion of the development of Rule 23 treatment of mass torts. The court actually held that the case was properly certified as a settlement class under Rule 23(b)(1)(A). 880 F.2d at 747-48.

Moreover, the first cited passage from A.H. Robins, 880 F.2d at 740, acknowledges that the court can certify separate issues (*i.e.*, Rule 23(c)(4) (A)), but continues with language omitted by the majority: "… and, if such separate issues predominate sufficiently (i.e., *is the central issue*), to certify the entire controversy as in Agent Orange." *Id.* (emphasis added). The other passage, 880 F.2d at 728, deals with subclasses (*i.e.*, Rule 23(c)(4)(B)), reiterating the rule that any subclass must meet the requirements for a class.

Next, the majority cites three cases that it says explicitly endorse its position. Valentine v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996), does subscribe to the majority's view in *dicta*, but the actual holding was to reverse certification because it was not clear that plaintiffs satisfied either typicality or adequacy of representation. *Id.* Simon v. Philip Morris, Inc., 200 F.R.D. 21, 28-31 (E.D. N.Y. 2001), is, in effect, a long treatise on the powers of federal judges to sever issues and trials in complex litigation, and was handed down *before* the motion for class certification in case that was even argued. 200 F.R.D. at 24. Consequently, it did not apply the majority's rule either. In Emig v. American Tobacco Co., Inc., 184 F.R.D. 379, 395 (D. Kan. 1998), plaintiffs advanced the majority's argument and the court rejected it. Thus, until now, the majority's position has not had a practical as opposed to theoretical effect on litigants.

Even among the commentators, only Newberg supports the majority. In 7B Wright and Miller, Federal Practice and Proc., Civil 2d, § 1790, the authors state that even if only one common issue can be identified as appropriate for class treatment, this is enough *as long as the other Rule 23 requirements have been met.* *Id.* (emphasis added). The authors continue:

> When the court finds that the noncommon issues are inextricably entangled with the common issues, *or that the uncommon issues are too unwieldy or predominant to be handled adequately on a class basis*, [the court] may have to dismiss the action or strike the class action allegations.

Id. (emphasis added). Only Newberg unqualifiedly supports the notion that a court can manufacture predominance by segregating issues. *See* 1 H. Newberg and A. Conte, Newberg on Class Actions, § 4.25. Newberg cites Rule 23(c)(4) itself, Valentino, In re A.H. Robins, and Goldwater v. Alston & Bird, 116 F.R.D. 342, 351 (S.D. Ill. 1987), a case which Newberg acknowledges holds that the predominance requirement was satisfied. Thus, it should be concluded that the majority's position is novel, radical, and poorly supported. It does, however, set up a clear doctrinal conflict with the Fifth Circuit. Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996). Because any company doing business in any state in the Fourth Circuit can be exposed to a crushing aggregation of claims giving rise to unfair pressures to settle even poorly grounded claims, your amicus has a substantial interest in urging this Court to review this circuit split now.

2. The Majority Adopted a Criterion for Certification in Violation of Amchem Prods., Inc. v. Windsor

The panel majority relied on the holding of Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 186 (4th Cir. 1993), that encouragement of settlement is a valid purpose for class certification. This holding was based on In re A.H. Robins Co., Inc., 880 F.2d at 740 (4th Cir.), *abrogated by* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). But this part of A.H. Robins was abrogated by the Supreme Court in Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618-22 (1997), as the standard citation signal cited above reflects. Therefore, the panel majority decision rests, at least in part, on a standard for class certification that has been overruled by this Court.

Moreover, in every circuit to have considered the matter, creating settlement pressure is now a factor which weighs in favor of granting interlocutory review of class certification under Rule 23(f). Blair v. Equifax Checking Servs., Inc., 181 F.3d 832, 833-36 (7th Cir. 1999); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 292-95 (1st Cir. 2000); Prado-Steiman v. Bush, 221 F.3d 1266, 1271-77 (11th Cir. 2000); Lienhart v. Dryvit Systems, Inc., 255 F.3d 138, 146 (4th Cir. 2001); In re Sumitomo Copper Litig., 263 F.3d 134, 139 (2d Cir. 2001); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001); In re Lorazepam & Clorazepale Antitrust Litig., 289 F.3d 98, 99-100 (D.C. Cir. 2002); In re Delta Air Lines, 310 F.3d 953, 960 (6th Cir. 2002); Fed.R.Civ.P. 23(f), Advisory Committee Note. The panel majority's treatment of the possibility of settlement as a reason for giving discretion to certify parts of cases to force settlement is discordant with this authority as well as being in direct conflict with Amchem and the Fifth Circuit.

3. The Panel Opinion Grants Virtually Unfettered Discretion to District Courts And Eviscerates Rule 23(f).

With the adoption of Fed.R.Civ.P. 23(f) in 1998, providing for interlocutory appeal of class certification decisions, the federal system adopted a policy that early review of class certification decisions on a discretionary basis could advance the fair, orderly, and inexpensive determination of litigation. *See* Fed.R.Civ.P. 23(f), 2003 Committee Note. By its decision in this case, the majority of the panel has effectively eviscerated that policy.

Under the majority opinion, a district court need only hold that there is some common issue capable of class-wide resolution and state its intention to decertify the class if problems of manageability become overwhelming. At that point the majority opinion defers to the desire of the district court to undertake the experiment even though manageability problems have not been presently and adequately addressed. Because there is unlikely to be another decision in any given case from which Rule 23(f) appeal would lie, this deference deprives defendants of the protection Rule 23(f) was designed to provide.

The proper approach is to require the plaintiff to demonstrate how the case can be tried on a class-wide basis prior to certification. For a proper predominance and superiority analysis, the court must know how the case will be tried. Castano v. American Tobacco Co., 84 F.3d 734, 744-45 (5th Cir. 1996). In Gunnells, the district court did not require plaintiffs to carry their burden to show by a rigorous analysis that all of the requirements of Rule 23(a) and Rule 23(b)(3) were met. It should not be readily assumed that a class certification that by design will result in 1400 minitrials on proximate causation and damages is a superior mode of procedure or resolves predominantly common issues as those concepts are properly understood.

Conclusion

Amicus National Home Equity Mortgage Association prays that the Court grant the petition for *certiorari* in this case because if the Fourth Circuit regime announced in Gunnells is allowed to stand, the practice of forcing settlements through aggregation of claims discountenanced in Amchem can evade review for years. For if a party loses a Rule 23(f) petition for interlocutory review - as most will under the hyper-deferential standards enunciated in Gunnells - few litigants in the Fourth Circuit or in any other circuit following Gunnells could be expected to display the hardihood to embark on "the thankless task of 'you bet your company' where the superhigh stakes … make settlement a moral imperative, regardless of the merits of the case." R. Epstein, "Class Actions: Warping the Law", National Law Journal 26, 29 (Mar. 22, 2004). Where settlements are coerced as a matter of course there will be few vehicles for later review through which to resolve the existing circuit split. Because denial of a Rule 23(f) appeal is practically immune from Supreme Court review, the problem is all the more likely to evade review if not addressed now. According to the Advisory Committee Note for subdivision(f), "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Wherever a district court follows Gunnells and interlocutory review is refused, settlement pressures will prevent the matter being tested in a way which reaches this Court. As Prof. Epstein has recently stated: "The overall class action system is in an acute state of distress." *Id.* Allowing Gunnells to stand would only contribute to that distress.

Respectfully submitted,

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